DOCUMENT RESUME

ED 198 593 CS 503 275

AUTHOR Kane, Peter E., Ed.
TITLE Free Speech Yearbook 1980.
INSTITUTION Speech Communication Association, Falls Church, Va. Commission on Freedom of Speech.
PUB DATE 81
NOTE 128p.
AVAILABLE FROM Speech Communication Association, 5105 Backlick Rd., Suite E, Annandale, VA 22003 ($5.50).

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Attitude Measures; Bibliographies; Censorship; Civil Liberties; *Communication (Thought Transfer); Court Litigation; *Freedom of Speech; International Educational Exchange; *Journalism; *Mass Media; Moral Issues; Periodicals; Press Opinion; *Speech Communication

ABSTRACT

The 11 articles in this collection deal with theoretical and practical freedom of speech issues. The topics covered are (1) the United States Supreme Court and communication theory; (2) truth, knowledge, and a democratic respect for diversity; (3) denial of freedom of speech in Jock Yablonski's campaign for the presidency of the United Mine Workers; (4) Samuel M. (Golden Rule) Jones, an unorthodox champion of free speech; (5) access rights to the mass media; (6) the effects of censorship on the valuation of sexually explicit messages; (7) international exchange of scientific information during crisis; (8) the Supreme Court and the First Amendment in 1979-1980; (9) H-bomb secrets and the "Progressive" magazine; and (10) trends, measurement, and individual difference considerations in attitudes toward free speech. The eleventh article is a bibliography of materials published from July 1979 to June 1980 dealing with freedom of speech. (FL)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED198593

U S DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

FREE SPEECH YEARBOOK 1980

a publication of
The Commission on Freedom of Speech
of the
Speech Communication Association
Volume 19

Editor: Peter E. Kane
State University of New York
College at Brockport

1980 Editorial Board

Alton Barbour	University of Denver
Haig A. Bosmajian	University of Washington
David Eshelman	Central Missouri State University
Alvin Goldberg	University of Denver
William I. Gorden	Kent State University
William Linsley	University of Houston
Gregg Phifer	The Florida State University
Thomas L. Tedford	University of North Carolina at Greensboro

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY
Speech Communication Association
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

Speech Communication Association
5105 Backlick Road
Annandale, Virginia 22003

1981

CS503275

Table of Contents

The Supreme Court and Communication Theory: Contrasting Models of Speech Efficacy
William Bailey, University of Arizona 1

Truth, Knowledge, and a Democratic Respect for Diversity
C. Jack Orr, University of Delaware 16

Denial of Freedom of Speech in Jock Yablonski's Campaign for the UMWA Presidency
Richard J. Jensen, University of New Mexico 21

Samuel M. (Golden Rule) Jones: Unorthodox Champion of Free Speech
Paul H. Boase, Ohio University. 32

Access Rights to the Mass Media: The Hidden Channels
Dean Silvers, State University of New York at Buffalo 40

The Effects of Censorship on the Valuation of Sexually Explicit Messages
David D. Hudson, University of Hawaii at Manoe 51

International Exchange of Scientific Information During Crisis: A Case Study in the Right to Communicate
Daniel Ross Chandler, Rutgers University 58

The Supreme Court and the First Amendment: 1979-1980
William A. Linsley, University of Houston 67

Freedom of Speech Bibliography: July 1979-June 1980
David Eshelman, Central Missouri State University 77

H-Bomb "Secrets" and the Progressive
Gregg Phifer, Florida State University 99

Attitudes Toward Free Speech: Trends, Measurement and Individual Difference Considerations
William I. Gorden and Dominic A. Infante, Kent State University 115

* * * * * *

The H. A. Wichelns Memorial Award for the most significant contribution to the Free Speech Yearbook was established in 1974 to honor Herbert Wichelns, a pioneer in the speech communication discipline and an early advocate of the importance of the speech-law aspects of speech communication.

1980 Award Recipient: William Bailey, University of Arizona

THE SUPREME COURT AND COMMUNICATION THEORY: CONTRASTING MODELS OF SPEECH EFFICACY

William Bailey
University of Arizona

Chafee wrote some years ago that the "real issue in every free speech controversy is . . . whether the state can punish all words which have some tendency, however remote, to bring about acts in violation of law, or only words which directly incite to acts in violations of law."[1] Thus the question of incitement readily reduces to a question of causal relationships between the speech and the violation of law. Chafee marked off the free speech boundary by postulating a series of statements that ranged from disapproval of war to direct advocacy of resisting induction, and a series of audiences that ranged from women in an old women's home to inductees starting for a training camp: "Somewhere in such a range of circumstances is the point where direct causation begins and speech becomes punishable as incitement under the ordinary standards of statutory construction and the ordinary policy of free speech . . . . "[2]

In this view, what must be determined is the real or probable efficacy of the speech in a given set of circumstances and with a given audience. But we may note now for later reference that the concern with the audience is with its direct involvement in the issues, and not with its attitudes or predisposition toward the issues. And another assumption of this view needs explicit statement: the law against incitement is not arbitrary; advocacy of acts in violation of law is a positive harm in that it brings about, causes, the unlawful acts, and it is this harm that justifies the abridgment of free speech. If the laws were arbitrary, if speech caused no harm, presumably incitement laws would be unconstitutional.

A central problem for this view of incitement is that causation is not observable but is an inference of relationships between or among phenomena. In an ordinary mechanical sequence of effects--say, one man pulling the trigger of a loaded gun pointed at another man--the sequence follows patterns of physical law. The chain of effects is empirically demonstrable, repeatable, and is of unquestionable harm to the man shot. But suppose bullets were no more harmful than water from a water pistol unless the person shot, for some reason, wanted them to be lethal. The law would take a much different position on the harm of shooting a man because the volition of the man shot would be the critical factor. This situation, while not wholly parallel with the speech situation, illustrates something of the problem of free speech prosecution: a speech is not "shot" at a man with the kind of predictable effects which characterize a gunshot, and to a considerable degree because the efficacy of the speech is extremely dependent upon the volition of the audience. Traditionally, the situation that follows a speech is taken as the measure of the effect of the speech, but in part this is an instance of the post hoc fallacy in classic form; the response made to a speech by an audience may be a more accurate measure of the predisposition of the audience than the power of the speaker to persuade. The speech act to a considerable degree serves as an occasion for the audience to manifest their convictions; most often the audience probably hears a speaker with which it is already in agreement, but some members of the audience may be there to heckle and disagree. In sum, the efficacy of a speech or speaker is very difficult to demonstrate.

Aspects of speech efficacy assuredly tend to follow certain patterns of probability, but the variables are so plentiful and so complex that it is doubtful the cause-effect relationships of the speech act can ever be shown to approach the regularity of mechanical cause-effect relationships.

This essay will argue that the Supreme Court has, like Chafee, assumed a very mechanistic model of speech efficacy: it will (1) attempt to illustrate the origin and nature of the model expressed in selected Court decisions; (2) attempt to present a typical, empirical model of speech efficacy; (3) attempt

to relate the significance of the empirical model to free speech prosecution. In brief, the contention to be supported is that the Court has both over-determined and over-estimated the efficacy of the speech act because of an inadequate model of the communication process. This essay will concern itself with Court decisions that are primarily applications or derivations of the "clear and present danger" test,[3] but the study is relevant to any test that assumes speech efficacy. The intention is to illustrate factors relevant to the Court's model, or concept, of speech efficacy, and not to account for either the development or abandonment of the clear and present danger test. Whatever contentions may be subsequently made concern only the pragmatics of the Court's view, and surely will not be mistaken for arguments of constitutional law. When the Court considers questions of probability or clear and present danger, it enters the realm of pragmatics, and it seems resonable to suggest that when the Court's pragmatic assumptions fail to accord with contemporary knowledge, they should be revised or abandoned.

The Nature of the Court's Model

It is significant that the spirit of the Espionage Act of 1917 was in part influenced, according to Chafee, by the "fear of German propaganda and the knowledge of legislation and administrative regulations guarding against it in Great Britain and Canada."[4] The motivational strength of this fear is suggested by Attorney General Gregory's argument for expansion of the Espionage Act as reported by Chafee:

> He stated that although it had proved an effective instrumentality against deliberate or organized disloyal propaganda, it did not reach the individual casual or impulsive disloyal utterness.[5]

The Espionage Act, per se, was less a threat to free speech than was the emotional tenor of the country:

> No one reading the simple language of the Espionage Act of 1917 could have anticipated that it would be rapidly turned into a law under which opinions hostile to the war had practically no protection. Such a result was made possible only by the District Court test and by the tremendous wave of popular feeling against pacifists and pro-Germans during the war. This feeling was largely due to the hysterical fear of spies and other German propaganda.[6]

In his study of propaganda Terence Qualter dates the concern of the general public with propaganda as beginning with World War I.[7] He notes that the linkage of propaganda with falsehood was widespread after 1918.[8] As the Espionage Act was intended to be a weapon against propaganda, the linkage of propaganda and falsehood goes far to explain the false statement clause of the Espionage Act and the convictions under the clause.[9] Qualter goes on to comment with obvious surprise:

> Even so eminent a scholar as James Bryce could, in 1921, accept uncritically the then popular attack on the war propagandists, and he defined propaganda as "that dissemination by the printed word of untruths and fallacies and incitements to violence."[10]

J. A. C. Brown states that it was with World War I that people began to have the "ambivalent feeling that propaganda is something sly, unpleasant, and frequently silly, yet also a weapon of devastating power for 'getting at' people without their consent."[11] Roger Brown comments that even today:

> In both popular and academic social psychology the "masses" are thought to be unable to resist certain kinds of persuasion.

> An unscrupulous propagandist can persuade the masses to act in a way that is not consonant with their own best interests.[12]

Americans, Roger Brown argues, believe they have in the past acted as masses and are afraid of a recurrence;[13] in parody of the American attitude towards propaganda he cites William Empson:

> They believe in machinery more passionately than we do and modern propaganda is a scientific machine, so it seems to them obvious that a mere reasoning man can't stand up against it. All this produces a curiously girlish attitude toward anyone who might be doing propaganda. Don't let that man come near. Don't let him tempt me, because if he does, I'm sure to fall.[14]

The response that society has made to this view of the weak, virtuous-because-untempted general public is manifested in incitement statutes and incitement clauses of statutes. It is most significant that the history of the Supreme Court's treatment of free speech and the general public's fear of propaganda began together with World War I.

That in the aftermath of World War I the Court worked with a concept of propaganda is unquestionable. Justice Clarke seems to have been particularly responsive. In the Abrams majority opinion he wrote that excerpts from the publication in question showed "the plain purpose of their propaganda was to excite . . . sedition, riots, and, as they hoped, revolution . . . ."[15] He again designated as propaganda the material before the Court in Milwaukee Social Democratic Publishing Company, saying that while it was "written more adroitly than the usual pro-German propaganda of that time," it still clearly proved its publishers intended to interfere with the war effort.[16] Material designated as propaganda by the lower courts was also coming before the Court. In the Gitlow majority opinion Justice Sanford noted that the Appellate Division had held the convicted men " . . . planned for militantly disseminating a propaganda."[17] In Dennis the Court argued that "propaganda will answer propaganda."[18] Justice Jackson concurred with the majority, but apparently had less than full faith in the statement on propaganda; he rejected the clear and present danger test on the grounds that it involved imponderables, among which was the prediction of "the effectiveness of Communist propaganda."[19] No effort has been made to cite all instances in which the Court or its members classified material as propaganda or spoke of propagandists, but it seems clear that the Court had an early and enduring concern with propaganda. It can also be shown that the Court viewed some speech as "compelling speech," speech that was inherently effective.

The landmark case of the clear and present danger test was, of course, Schenck, in which Justice Holmes wrote for the Court:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[20]

The passage provides obvious parallels to the citations from Chafee with which this essay began: by examining the language and the circumstances the questions of causation is readily resolved. Note the assumption that words may have a certain "nature," may inherently be such as to create the danger. The Holmes-Brandeis dissent in Gitlow makes more apparent the quality of this inherency.

Justice Sanford wrote for the majority in Gitlow that a "single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration," and the State "to protect the public peace and safety . . . seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration."[21] Holmes shifted

this fire imagery from the broad social plane to the specific speech situation. He argues that the principle difference between expression of opinion and incitement "in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason," but in his view, "the redundant discourse before us . . . . had no chance of starting a present conflagration."[22] The emphasis upon fire tempts speculation,[23] but it is at least safe to say the kind of persuasion the masses are unable to resist in the Holmes view, and agreed to by Brandeis, was that in which eloquence and enthusiasm--emotionality--overwhelmed reason.

The Holmes-Brandeis dissent in Gitlow rejected the broad view of the majority that tended to make doctrine punishable. In such a view, the dissenters argued, every idea must be considered an incitement.[24] The majority had turned away from examination of the specific speech situation for dangerous potentials and instead examined ideas. Cushman has argued that Gitlow was punished because he published "not dangerous words but forbidden words."[25] Such a contrast is rather difficult to maintain; presumably the words are forbidden because dangerous, inherently dangerous. Indeed, this view is precisely Sanford's argument. While disclaiming the possibility, and therefore the need, of the Court precisely to measure and foresee the impact of an utterance, Sanford wrote that the utterances of the Gitlow variety "by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution."[26] In other words, Sanford, along with Holmes, felt that certain speech had inherent efficacy, but that efficacy was not, as for Holmes, limited to a particular time and place. The danger was no less clear because not immediately present. The effect of this approach was to discard the obligation to show cause-effect relationships in the speech act; the Court needed to show only tendency since the time-place frame of reference was unlimited.

Brandeis wrote a concurring opinion for Whitney that, functionally, was another attack on the Gitlow decision: he pointed out that every advocacy or opinion contrary to law increased to some degree the probability of the future transgression of the law and insisted the Court confine itself to determining present danger, and danger of a serious nature.[27] The essence of the Holmes-Brandeis attack on the Gitlow opinion is the effort to lead the Court back to confront directly the question of speech efficacy.

The consequence of the Court's freeing itself of the burden of demonstrating speech efficacy becomes apparent in the logical problems confronting Justice Vinson in Dennis. He could not conceive that the clear and present danger test meant the government must "wait until the putsch is about to be executed," or must assume the putsch would not be attempted until success or probability of success as a criterion."[28] Yet Justice Vinson accepted Judge Hand's formula that "the gravity of the 'evil' discounted by its improbability must be held to justify invasion of free speech to avoid the danger."[29] Assumedly, the evil is the speaker's goal, is success, and how that evil may be discounted by its improbability without invoking the criterion of probability seems less than clear.

In Yates efficacy is less a question than whether the speaker advocated an action or a belief.[30] This view suggests that the Court at this time held a rather arbitrary view of incitement; certain utterances had already been held to be inherently dangerous, and these were advocacies of certain actions. There was no need to consider the efficacy of the particular utterance in a particular time and place but only whether it fell into the advocacy of action category. The same sort of categorical approach is manifested in Scales: Justice Harlan stated "It was settled in Dennis that the advocacy with which we are here concerned is not constitutionally protected speech."[31] The advocacy of the Communist Party was inherently dangerous, and Scales could therefore not claim individual First Amendment protection. Here is a consequence of shifting away from consideration of individual speech efficacy in a given time and place toward a doctrinal approach; the defendent comes before the law not as an individual, but as a part of a whole already damned. The Court would have perhaps

served its ends better if it had confronted more directly the problems germane to its assumptions concerning speech that had inherent efficacy, and therefore was inherently dangerous.

The Court's decision in Kingsley International Picture Corp. v. Regents of University of New York represents a shift back to the Holmes-Brandeis conception of clear and present danger, i.d., a danger that is both imminent and likely.[32] The shift was affirmed in Brandenberg v. Ohio, where the court distinguished between mere advocacy and incitement to imminent, likely, lawless action.[33] In his concurrence with that decision, Douglas discusses the Court's prior abandonment of the Holmes-Brandeis conception of clear and present danger, and argues cogently the lack of necessity to punish speech.[34] The "imminent and likely" criteria was again the controlling factor in the court's decision in Communist Party of Indiana v. Whitcomb.[35]

At this point two cases will be considered that fit neither the foregoing class of national security cases nor the subsequent class of public order cases, but are still relevant to the concerns of this essay and may be dealt with briefly in relevant aspects. In Musser v. Utah there is found a germinal differentiation between persuasive and coercive speech drawn apparently on the basis of pressure applied by a group upon individuals to practice polygamy.[36] This differentiation constitutes the clearest expression of a notion of "compelling speech," but it is of course complicated by religion and other factors that are peripheral to speech. The second case is Beauharnais wherein Justice Jackson dissented and argued the validity of the clear and present danger test in libel cases. Jackson said of the test: "It is the most just and workable standard yet evolved for determining criminality of words whose injurious or inciting tendencies are not demonstrated by the event but are ascribed to them on the basis of probabilities."[37] The principal reason for citing Jackson's statement is that it makes explicit the certainty that in speech events where harm occurs, harm may be ascribed without question to the words involved. And it is also explicit that in the absence of such an occurrence of harm, but where there is suspected "clear and present danger" of harm, again the only place to seek for efficacy in producing the harm is the speech.

Court decisions pertaining to violation of public order have also manifested the concept of efficacy inherent to some forms of speech. In Kunz the question was primarily one of prior restraint, but Justice Jackson's dissent reveals the same suspicion of emotionalism in speech as was expressed by Justice Holmes:

> Written words are less apt to incite or provoke to mass action than spoken words, speech being the primitive and direct communication with emotions. Few are the riots caused by publications alone, few are the mobs that have not had their immediate origin in harangue.[38]

This passage follows Jackson's statement that the purpose of First Amendment protection of speech "is to foster peaceful interchange" of information, thoughts, and ideas: "Its policy is rooted in faith in the force of reason,"[39] and, it might be added, "in suspicion of the forces of emotion." In this psychology of dichotomized reason and emotion, assuredly outdated, the danger arises from the emotional, irrational side of man. It is worth noting, too, that the communication is considered to be a direct instrument, to be directly in touch with the primitive emotions and can therefore "get at" people without their consent. The final proposition can be reversed: it can be logically argued that mobs encourage harangues.

In Cantwell Justice Roberts stated for the Court that the power of the state to punish or prevent clear and present danger of riot, disorder, or other threats to the public well-being was obvious.[40] Also stated was the speaker's responsibility for the reasonably expected consequences of his speech, whether or not the consequences were intended.[41] These statements are

relevant to the subsequent discussion of Feiner. In Chaplinsky, Justice Murphy designated a "class" of utterances that enjoyed no protection; this class included lewd, obscene, profane, libelous, and insulting or "fighting" words, all of which were held by the Court to be of "no essential part of any exposition of ideas," and that "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[42] The phrase "by their very utterance" parallels Justice Sanford's statement in Gitlow that the utterances "by their very nature" endangered the peace and security of the state. Inherent efficacy of some words is again manifested, and it is reasonably clear that the words are of the expressive or emotional variety and are held in contrast with reason, or the exposition of ideas.

Justice Douglas insisted in Terminiello that there be demonstrated "a clear and present danger of a serious substantive evil that arises far above public inconvenience, annoyance or unrest."[43] Terminiello's speech taken in conjunction with the Court's decision suggests that the "classes of speech" concept of Chaplinsky may be specious. The Court did not feel it had to rule on the "fighting words" question in Terminiello.[44] Justice Jackson certainly had a strong and logical point in his dissent; the epithets for which Chaplinsky was prosecuted were mild in comparison with those Terminiello employed.[45] Yet, it must be conceded that Terminiello was indeed engaged in the exposition of ideas. The question as to whether some classes of speech are nonessential to the exposition of ideas would seem to turn on the adequacy of the speaker's vocabulary. Educationally and culturally deprived citizens or citizens of limited intelligence cannot be expected to express their attitudes with the turn of a phrase requiring the literary skills exhibited by some Court justices. But the question of First Amendment disenfranchisement of the illiterate and poorly educated is a constitutional question beyond the scope of this essay. More relevant is the Court's suspicion of expressive or emotional language and its concept of inherent efficacy. Even for Justice Douglas there was no question that Terminiello was the cause of "inconvenience, annoyance or unrest."

The Court's concept of unidirectional influence--that the speaker does something to the audience as the sole causative agent--is apparent in Feiner, where Justice Vinson ruled for the Court that Feiner was "neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction it actually engendered."[46] Vinson went on to point out that it was not necessary to conclude from the general prohibition of using police to supress free speech that the police were powerless "when as here the speaker passes the bounds of argument of persuasion and undertakes incitement to riot . . . ."[47] It may be recalled that Feiner had more to fear from a riot than did the state; the audience was hostile.

Although Feiner was presumably seeking support for his ideas from the audience, the court did not have to weigh his intentions heavily against the effect it presumed his speech caused. That was settled in Cantwell. In holding the speaker responsible for the consequences of the speech situation regardless of the effects the speech was intended to have, the Court thus makes clear the completeness of its commitment to the view of the speaker as the sole cause of whatever effects accrue. It may be argued that if Feiner had not made the speech, or if he had made a different speech, the disorder would not have occurred. It is equally obvious that if the audience had not been present, or if a different audience had been present, the disorder would not have occurred.

In the rash of cases involving public disorder during the late sixties and early seventies, the Court had occasion to apply and refine the "fighting words" doctrine, and did so with considerably more sophistication as to speech efficacy than had been evidenced before.[48] The principal case of the group to be considered is Cohen v. California.[49] At issue was Cohen's jacket which bore the motto, "Fuck the Draft." Justice Harlan, writing for the Court, reaffirms the right of the States, under Chaplinski, to ban "fighting words," defined by Harlan as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reactions."[50] However, such was not the case with Cohen's jacket since

the motto was addressed to no one in particular and unlikely to be taken as a personal insult by anyone.[51] Furthermore, a particular epithet cannot be excluded from public discourse on the grounds that its use is "inherently likely" to cause violence in the absence of evidence that a substantial proportion of the citizenry will react violently when the execretion is uttered.[52] In brief, the simple use of display of a word cannot be banned.[53] The Court notes that linguistic expression serves both cognitive and emotive functions, and that the emotive function may be the most important in some messages,[54] and thus takes a position quite different from earlier Court decisions in which the emotions were suspect.

In Gooding v. Wilson, [55] a situation in which murderous threats and abusive language were directed to policemen, the Court dismissed the case because of the overbreadth of the law as indicated by Georgia appellate decisions. In Rosenfield v. New Jersey,[56] which involved a prosecution for indecent language at a public school board meeting, the Court remanded the case to New Jersey Courts that had decided Rosenfield without benefit of Cohen and Gooding. Lewis v. City of New Orleans,[57] in which a woman had been convicted of reviling police officers, and Brown v. Oklahoma,[58] in which the conviction was for obscene language in a public place, were also remanded to the respective state courts.[59] Plummer v. City of Columbus,[60] involved a taxicab driver's conviction for verbally abusing a customer. Like Gooding, the words may have been "fighting words," but the ordinance was overly broad. In Hess v. Indiana,[61] the conviction was for uttering in the context of an anti-war demonstration, "We'll take the fucking street later [or again]." In a per curium opinion it was held that while the words might be offensive to some individuals, the words were not addressed to anyone in particular and therefore could not be "fighting words."[62]

It would appear that Justice Murphy's conception in Chaplinsky of "fighting words" that "by their very utterance inflict injury or tend to incite an immediate breach of the peace" has been eviscerated by the more recent Court's reluctance to decide cases simply on the basis of words uttered.[63] As Haiman notes, the "fighting words" category is restricted to personal epithets in a face to face situation and "limited also to circumstances where it can be demonstrated to a degree that is more than just speculative, that physical conflict was likely to ensue."[64] Even so, we are still at some remove from a position that recognizes the capacity of the "ordinary citizen" to walk away from "fighting words," to resist incitements to breaches of the peace or other illegal acts. If there is to be any kind of meaningful presupposition of innocence for a speaker prosecuted for incitement, recognition of the audience as a causal factor in speech situations must be made. It may be properly argued that if the audience is admitted as a causal factor in the speech situation, nothing the speaker says or does may be taken as proof of incitement. That is precisely the point of the following section of the essay.

Before moving to the next section, a summary here may be helpful. The early free speech cases occurred during a period of time when society was frightened virtually to hysteria by the threat of propaganda. It was, and still is, feared that the persuader could "get at" an audience without its consent. Especially suspect were the emotional appeals that could cause men to act irrationally. In this view, speech is a direct instrumentality that compels behavior, and the flow of influence is unidirectional, from the speaker to the audience. This view of speech is inherent to the rationale behind prosecution of incitement and has manifested itself in the opinions of the Court.

The Empirical Model of Speech Efficacy

This section will be devoted to the presentation of a reasonably typical empirical model of speech efficacy. Rather than attempt to integrate individual experiments or theories, the presentation will draw upon summary opinions of scholars and researchers making comment upon such broad areas of study as propaganda and public opinion. There is no intent to present a thorough, scholarly survey, but only to present as clearly as possible in the least amount of space the contemporary view of speech efficacy based upon empirical research.

At the outset it seems advantageous to contrast the model discussed in the prior section with the model to be presented in this section. Professor Bauer accomplishes the contrast with considerable efficiency:

> The social model of communication is a model of one-way influence in which the communicator presumably has power and "does something to the audience," with or without its consent. This model of communication emphasizes the exploitation of man by man . . . . In fact, however, the history of communication research seems to offer more support for a different model.
>
> The scientific model of communication more accurately reflects what is known from communication research. It views communication as a two-way transaction between communicator and audience in which each party is engaged in problem solving, and in which each party both gives and gets something.[65]

The transactional aspect of the model is important. As Professor Bauer points out, in the latter model we are led to look not only for the influence of the speaker upon the audience, but as well "for the audience's effect upon the communicator."[66] Bauer feels that "Perhaps the most important implication of the transaction is that when we try to change others we get changed ourselves."[67] The social model has been wholly abandoned and the emphasis is upon constructing a model adequate to the transactional elements of the communication process.[68] There is no question that the speech situation is effective in changing attitudes or behavior; however, the efficacy depends to a significant degree upon the audience.[69] Both the hidden and overt persuader are far less powerful than previously thought. The study of propaganda has brought forth considerable information on this point.

A common and significant insistance of propaganda studies is that decided differences in both kind and efficacy of propaganda exist between democratic and totalitarian societies. Qualter points out that the greater power of the totalitarian propaganda does not derive from superior techniques but from a monopoly control over the means of propaganda and the use of force to exclude rival propaganda; this fact leads him to conclude that in a genuine democracy there will be the greatest possible free competition among the propagandists for a variety of causes:

> This competition is desireable, not only to prevent the emergence of a totalitarian monopoloy . . . but also because the fillip of new, controversial ideas is in itself a stimulating educating force . . . Rival propaganda campaigns are one of the most important forces for provoking individual thinking on any issue. Now, although a democratic government may give a lead to public opinion . . . it is not part of its function to determine the religious, philosophic, economic, social, or purely eccentric beliefs of its people. The government is not the guardian of the public conscience and has no authority to object to the faith of any of its citizens or to their desire to convert others to that faith.[70]

Qualter goes on to point out that the average propagandist in a democracy may have ambitions of "moulding a public mind to his own design," but the competition forces his propaganda to take on an educational function, about which the audience makes up its own mind: "The propaganda makes the people aware of the issues to be considered, but it seems to have less effect than once imagined in determining how people will react to these issues."[71] Similarly, Klapper points out that "The condition believed to render persuasion most effective is monopoly propaganda position. In the United States, such a position can be achieved only by persuasion for attitudes which already enjoy almost universal sanction."[72]

George A. Miller finds that the "power of the propaganda campaign is not

as alarming as it might seem on first consideration. People seek out and believe what they want to believe, and they let themselves be pushed in the way they want to go."[73] Roger Brown concludes that the power of propaganda has been "oversold,"[74] and that fear in this country of Russian propaganda that appears to hold the Russians in its grip fails to recognize the difference between the monopoly situation in Russia and the competitive situation in the United States.[75] Roger Brown makes a very significant point on speech efficacy when he states, "Speech is not directly instrumental, it does not compel action. The consent of the audience is won by convincing them that the recommended action is in their own best interests."[76]

J. A. C. Brown concludes:

> . . . it would appear that the main lesson to be drawn from our present study of propaganda is how very resistant people are to messages that fail to fit into their own picture of the world and their own objective circumstances, how they deliberately (if unconsciously) seek out only those views which agree with their own.[77]

J. A. C. Brown makes a quite ironic point: he argues that in their study of Gallup polls and motivation research to find out what the people really think, the "would-be brainwashers of Western democracies are being brainwashed"; only in the Communist "people's democracies" are the brainwashers "performing their proper function."[78]

Berelson writing on public opinion and communication provides from that point of view a close parallel with the opinions already expressed:

> The point is that the nature of one's audience places certain limits upon what one can say to it--and still have an audience . . . .
>
> It is important to take account of this direction in the flow of influence between communication and public opinion in order to appreciate the reciprocal nature of that influence, i.e., to recognize that it is not all a one way process. It is also important to note that the total effect of this reciprocal process is probably to stabilize and "conservatize" opinion since ideologies are constantly in process of reinforcement thereby. The over-all picture then, is that of like begetting like begetting like.[79]

It is clear that the efficacy of the persuader has been in the past over-estimated and that a considerably greater danger may attach to limiting speech significantly than to giving it free rein. One of the most relevant statements with regard to policy concerning free speech was made by Daniel Katz, commenting on the study of attitudes. Katz defines two streams of thought that have been traditionally held and that assume contrasting models.[80] On the one hand is the tradition that assumes an irrational model and holds that men are very limited in powers of reason, reflection, discrimination, self insight and memory, and that "Whatever mental capacities people do possess are easily overwhelmed by emotional forces and appeals to self-interest and vanity."[81] In the second tradition, a rational model is invoked. This model assumes that man "seeks understanding . . . ., consistently attempts to make sense of the world about him, that he possesses discriminating and reasoning powers . . . and that he is capable of self-criticism and self-insight. It relies heavily upon getting adequate information to people."[82] Both of these viewpoints have been supported by research, and Katz concludes:

> Now either school of thought can point to evidence which supports its assumptions, and can make fairly damaging criticism of its opponent . . . .

> The conflict between the rationality and irrationality models was saved from becoming a worthless debate because of the experimentation and research suggested by these models . . . . In general, the irrational approach was at its best where the situation imposed heavy restrictions upon search behavior and response alternatives . . . . On the other hand, where the individual can have more adequate commerce with the relevant environmental setting, where he has time to obtain more feedback from his reality testing, and where he has a number of realistic choices, his behavior will reflect the use of his rational faculties.[83]

The import of this position is clear: if irrationality is the desired end for man, restrict his access to communication, effect a persuasive monopoly; if rationality is the desired end, give him free access to all possible views and advocacies, make a persuasive monopoly impossible. But the primary force of the arguments of this section should be directed against the concept of incitement. It should be evident that the Court has assumed wrongly that the speaker is the causative agent in the speech situation, and it is this unwarranted assumption that modern communication research most strongly rejects.

Conclusion

This section will conclude the essay with an attempt to sharpen the relationship and significance of the empirical model to free speech prosecution. To that end a very contemporary complaint about the lack of empirical analysis on the part of the Court is relevant. In his free speech arguments relating to black power advocacy Paul Harris contends, "The clear and present danger test sidesteps the question whether or not there was a real causal connection [between advocacy and violence] by requiring only that reasonable men agree that the advocacy could have caused the violence."[84] Harris continues:

> The Court has never made a full empirical analysis of the advocate's relationship to the expected danger. It may be that the judicial process is not adequate to make these kinds of determinations. But if the Court is committed to a formula which requires determinations as to when there is an actual danger and as to the likelihood speech causing action, then its refusal to attempt empirical answers to these issues results in vague notions of danger and causality determining the scope of free speech.[85]

The arguments of this essay support the contentions of Harris but point in a direction other than empirical determination by the Court of individual speech efficacy. As Harris intimates, the judicial process does not seem adequate to make such determinations. Nor does it need to. The empirical model is a generalization of empirical findings with regard to speech efficacy. If the Court were guided by such a model in its deliberations, it could not affirm incitement convictions but would hold that too many variables enter to allow the conviction and that no audience can be compelled by words to commit acts they do not want to commit.

The major function of the empirical model of communication in free speech prosecution would be the correction it would make of the older model's over-estimation and over-determination of the efficacy of a speaker or a speech. Correction would be accomplished primarily through the model's inclusion of the audience as a definite and possibly determinant factor in speech efficacy, and this inclusion renders the causal factors traditionally assigned to the speaker possibilities rather than certainties. The empirical model, if incitement prosecution could be contemplated under its auspices, could as easily lead to prosecution of an audience for incitement of a speaker as the reverse. But in

fact, the model destroys the concept of incitement.

The significance of the empirical model is that it wholly denies the notion of inherent efficacy which was the enabling assumption of the Espionage Act convictions. Guided by such a model the Court could not assume that words "by their very nature" or "by their very utterance" have any efficacy, because the efficacy of the words is dependent upon the audience hearing them. In brief, guided by the empirical model the Court would hold the position that the speech act is at least as much determined in its efficacy by the mind of the listener as by anything the speaker may do.

It is plain then, that should the Court adopt an empirical view of speech efficacy, the abridgment of free speech by incitement prosecution would end. "Reasonable men" could not agree that an advocacy could cause violence in the absence of a predisposition toward violence on the part of the audience. And assuming such a predisposition could be demonstrated, "reasonable men" would not agree that the speaker's contribution could be separated from the audience's contribution.

At this point some objections may be considered. One objection might be to the general tenor of an argument against incitement prosecution: why should advocacy in violation of law receive First Amendment protection? This question reflects an increasingly popular attitude, and since the Court's decisions have affirmed incitement convictions, the burden of proof seems to rest on the libertarian. But the easy assertion that freedoms are not absolute is not a rationale for limiting those freedoms in the absence of a clearly defined harm. The arguments of this essay have raised substantive questions concerning the pragmatics of the Court's assumptions relating to incitement. If incitement convictions cannot be upheld by the Court upon an empirical, factual basis, surely everyone would agree the very notion of incitement is one that the judicial process is better off without. It is not necessary for one to approve of the radical's method or message to see the injustice of prosectuion or conviction based upon erroneous premises. The fore-going arguments attack the basis of incitement prosecutions: the assumption that incitement has inherent efficacy and therefore causes violation of the law. If it cannot be maintained that speech is the direct instrument of violation of law, the argued need for abridgment of First Amendment protections by incitement statutes is without substance.

It may be objected that "incitement" is used in this essay in a far stronger sense than it has in legal usage, where it means only to "urge," "stimulate," or "advocate," and not at all "to compel by speech." Citations from the Court opinions given above manifest assumptions of inherent efficacy that argue to the contrary. Besides, if "urging," "stimulating," or "advocating" were not deemed highly effective in causing the proscribed act, if "incitement" does not in meaning approach "compelling speech," then why should it be prosecuted?

The assumption of a rational audience may be considered excessively idealistic, but that has already been answered in part, above, by Katz. The counter-assumption, that man is irrational, carries its own condemnation: how does he who asserts man's irrationality exempt himself and his statement? Most probably he does not mean <u>all</u> men, and when pressed will reveal the elitist assumption of irrational masses. But the questions of whether or not the masses are rational must assume the masses have free access to opinion and information.

Finally, whether or not men are rational, or have free will, the law obviously assumes they do, and it makes each man responsibile for his individual act. Even the most hardy opponent of the arguments offered here against incitement prosecution must surely concede that it is inconsistent for the law to assume individual responsibility, but yet punish a speaker for what an audience did, or might have done, as if the speaker were some warlock or wizard who could deprive the individual of his reason and autonomy. Future generations may well look back upon the speech prosecutions of this age with the same feelings we experience when we contemplate the earlier period of our history when men burned witches.

Endnotes

[1]Zecharia Chafee, Free Speech in the United States (Cambridge, 1941), p. 23.

[2]Ibid., p. 48.

[3]The clear and present danger test makes most obvious assumptions concerning speech efficacy. Its current viability has been called into question. See Harry Kalven, "The New York Times Case: A Note on 'The Central Meaning of the First Amendment,'" The Supreme Court Review, 1964, pp. 191-221; for a rather brief contrary opinion flavored by international implications see William van Alstyne, "The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comment and Footnotes," Law and Contemporary Problems: International Control of Propaganda, XXXI (Summer 1966), fn. 56, pp. 546-47. The concern of this essay is only with the test's propensity for forcing the Court to state causal relationships between speech and illegal acts.

[4]Chafee, p. 38.

[5]Ibid., pp. 39-40.

[6]Ibid., pp. 63-64.

[7]Terence H. Qualter, Propaganda and Psychological Warfare (New York, 1962) pp. 4-6.

[8]Ibid., p. 22.

[9]See Chafee, pp. 38-42, and especially 53, 92-97. If falsehood was considered a defining characteristic of propaganda, then the false statement clauses of the Espionage Act may be seen as a head-on attempt to eliminate propaganda. The convictions that were obtained by proof of falsity were, finally, convictions for propagandizing. The false statement clauses of the Espionage Act amply testify to the nation's fear of propaganda as extremely dangerous.

[10]Qualter, p. 22.

[11]J. A. C. Brown, Techniques of Persuasion (London, 1963), p. 11.

[12]Roger Brown, Words and Things (New York, 1958), p. 300.

[13]Ibid.

[14]Ibid., p. 301. The statements by J.A.C. Brown and Roger Brown taken together describe the concepts of "compelling speech" and "inherent efficacy" as they are used in this essay. Judge Hand also expresses the same conceptualization: "One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion but the triggers of action . . . . " (Emphasis supplied) Masses Publishing Company v. Patten, 244 Fed. 535 (S. D. N. Y. 1917), 540. While no propaganda hysteria exists today under that label, people do fear "hidden persuaders," mass media, and campus and ghetto agitators. Of course, one does not fear for himself, but for a presumed irrational "mass" somewhere out there in society that gets "carried away" by the emotionalism of the agitator. The "girlish attitude" of which Empson writes is the collective attitude, not the individual attitude--unless we unconsciously fear for ourselves.

[15]Abrams v. United States, 250 U.S. 616 (1919), 623.

[16]Milwaukee Social Democrat Publishing Company v. Burleson, 255 U.S. 407 (1921), 415.

[17]Gitlow v. New York, 268 U. S. 652 (1925), 662.

[18]Dennis v. United States, 341 U. S. 494 (1951), 503.

[19]Ibid., 570.

[20]Schenck v. United States, 249 U. S. 47 (1919), 52.

[21]Gitlow, 669.

[22]Ibid., 673.

[23]Fire, of course, is connected with the emotions, and it also has a long history of association with speech and the emotions--speakers make fiery speeches, incendiaries ingnite public opinion, etc. It may be that Justice Sanford picked up Holmes' statement in Frohwerk v. United States, 249 U. S. 204 (1919), at 209, that if the paper in question had been circulated in the right quarters "a little breath would be enough to kindle a flame." By comparison Sanford may have felt the Gitlow literature could start a conflagration. Whether Holmes' well known example of a man shouting "Fire!" in a crowded theatre may be read symbolically as the propagandist in society is an interesting question; short of such a reading, the example shows a remarkable facility for reductionism on the part of Holmes. There are very real differences between shouting a word and making a speech, and very real differences between questions of public order and the questions confronting the Court in Schenck. A man might injure another's hearing by shouting in his ear, but taking such an instance as an argument for limiting communication would be wholly fanciful. Whatever the origin of the fire imagery, to which even Justice Douglas succumbs in his dissent on Dennis, q. v., the suspicion of emotions on the part of the Court is clearly manifested by the imagery.

[24]Gitlow, 673. C. Herman Pritchett dismisses Holmes' statement that "every idea is an incitement" as "some fine prose," which suggests a wholly different reading of that dissent (Civil Liberties and the Vinson Court [Chicago, 1954], p. 26). But the contrast explicitly made in that dissent between the narrow and the broad view of incitement would seem to indicate the dissenters are illustrating the logical extension of the broad view.

[25]Robert E. Cushman, "'Clear and Present Danger' in Free Speech Cases: A Study in Judicial Semantics," Essays in Political Theory, Milton R. Konvitz and Arthur R. Murphy, eds. (New York, 1948), p. 318.

[26]Gitlow, 669.

[27]Whitney v. California, 274 U. S. 357 (1927), 376-78.

[28]Dennis, 509-10.

[29]Ibid., 510.

[30]Yates v. United States, 354 U.S. 298 (1957), 324-25.

[31]Scales v. United States, 367 U. S. 203 (1961), 228.

[32]Kingsley International Picture Corp. v. Regents of University of New York, 360 U. S. 684 (1959), 689.

[33]Brandenberg v. Ohio, 395 U. S. 444 (1968), 47, 49.

[34]Ibid., pp. 450-57.

[35]Communist Party of Indiana v. Whitcomb, 414 U. S. 441 (1973), 448.

[36]Musser v. Utah, 333 U. S. 95 (1948), 101.

[37]Beauharnais v. Illinois, 343 U. S. 250 (1952), 303.

[38]Kunz v. New York, 340 U. S. 290 (1951), 307.

[39]Ibid., 302

[40]Cantwell v. Connecticut, 310 U. S. 296 (1940), 308.

[41]Ibid., 309.

[42]Chaplinsky v. New Hampshire, 315 U. S. 568 (1942), 571-72.

[43]Terminiello v. Chicago, 337 U. S. 1 (1949), 4.

[44]Ibid., 3-4.

[45]Ibid., 26.

[46]Feiner v. New York, 340 U. S. 315 (1951), 319-20.

[47]Ibid., 321.

[48]I shall not examine these cases in any depth because such has already been done by Franklyn S. Haiman, "The Fighting Words Doctrine: From Chaplinsky to Brown," Iowa Journal of Speech, III (Fall, 1972), pp. 3-31.

[49]Cohen v. California, 403 U. S. 15 (1971).

[50]Ibid., p. 20.

[51]Ibid.

[52]Ibid., pp. 23-4.

[53]Ibid., p. 26.

[54]Ibid.

[55]Gooding v. Wilson, 405 U. S. 518 (1972).

[56]Rosenfield v. New Jersey, 408 U. S. 901, (1972), 906.

[57]Lewis v. City of New Orleans, 408 U. S. 913 (1972). Lewis was reconsidered by the Louisiana Supreme Court and returned to the Supreme Court on appeal; the Court ruled the ordinance invalid because overly broad. See 415 U. S. 130 (1973).

[58]Brown v. Oklahoma, 408 U. S. 914 (1972).

[59]See Haiman for pertinent discussion of dissents and concurrences of individual Justices, especially those of Powell, pp. 23-26.

[60]Plummer v. City of Columbus, 414 U. S. 2 (1973).

[61]Hess v. Indiana, 414 U. S. 105 (1973).

[62]Ibid., pp. 107-8.

[63]Cf. Blackmun dissenting in Gooding, pp. 536-37.

[64]Haiman, p. 16.

[65]Raymond A. Bauer in The Obstinate Audience, Donald E. Payne, ed. (a seminar sponsored and published by the Foundation for Research on Human Behavior: Ann Arbor, 1965), p. 1.

[66]Ibid., p. 10.

[67]Ibid., p. 11

[68]So much has been published on this point that a reference is arbitrary. Of several excellent works, The Process and Effects of Mass Communication Wilbur Schramm, ed. (Urbana, 1957) is one of the best. See especially Schramm's article, "How Communication Works, " pp. 3-36. Other references to this work will appear below.

[69]Joseph T. Klapper, "The Comparative Effects of the Various Media," in Schramm, supra. pp. 102-103.

[70]Qualter, p. 148.

[71]Ibid., p. 153.

[72]Joseph T. Klapper, "Mass Media and Persuasion," in Schramm, supra, pp 317-18.

[73]George A. Miller, Language and Communication (New York, 1951), p. 269.

[74]Roger Brown, p. 302.

[75]Ibid., p. 339.

[76]Ibid., p. 340.

[77]J. A. C. Brown, p. 309.

[78]Ibid., pp. 310-311.

[79]Bernard Berelson, "Communication and Public Opinion," in Schramm, supra, p. 345.

[80]Daniel Katz, "The Functional Approach to the Study of Attitudes," Reader in Public Opinion and Communication, Bernard Berelson and Morris Janowitz, eds. (New York, 1966), pp. 51-52. (Also available in Foundations of Communication Theory, Kenneth K. Sereno and C. David Mortensen, eds. [New York, 1970], pp. 234-259).

[81]Ibid., p. 52.

[82]Ibid.

[83]Ibid., pp. 52-53.

[84]Paul Harris, "Black Power Advocacy: Criminal Anarchy or Free Speech," California Law Review 56 (May, 1968), p. 732.

[85]Ibid., p. 734.

TRUTH, KNOWLEDGE, AND A DEMOCRATIC RESPECT FOR DIVERSITY

C. Jack Orr
University of Delaware

Positing that "man's values are being uprooted, seldom adequately replaced, and often in disrepair," a panel discussion at the 1979 Speech Communication Association convention addressed "the need for a value system with universal appeal."[1] Asked to evaluate the prospect of such a system for the 21st century from a philosophical perspective, I arrived at two conclusions. First, from a democratic standpoint, the concept of a universal value system is morally ambiguous. Efforts toward such a system which respect diversity and seek a world-wide unity to promote it are laudable; efforts to impose one moral code by force or coercion on the human race are deplored. In the words of Richard McKeon, persons "should use unity to promote diversity and diversity to strengthen unity."[2] Second, in the effort to construct a universal value system, the case for democratic values is no stronger ultimately than the concept of truth upon which it rests. That is, if democratic values are to be given a strong advocacy amidst competing alternatives for universal allegiance, their epistemological basis must be clarified.

In this essay I will attempt to uncover an epistemological base--an understanding of truth--which best interprets a democratic respect for diversity and free speech on a universal scale. Discussion will be based in part upon current trends in communication theory which serve a similar end.[3] My purpose here is not merely analytic, but practical. I write as an educator charged with the responsibility of preparing students for the 21st century, an era in which value complexity is likely to be even greater and more salient than at present. Therefore, having developed four propositions regarding "truth, knowledge, and diversity," I will conclude the essay with a statement of ideals relevant to democratic education.

Truth, Knowledge, and Diversity

Proposition I - Respect for diversity is eroded logically by the view that truth is absolute and self evident to the beholder. In recent years, philosophers of communication have steadfastly attacked this view.[4] The doctrine of absolute, self evident truth, it is argued, too readily leads its proponents to conclude that absolute truth is self evident to themselves; that there is one correct approach to reality, and they know it. This conclusion is, according to Watzlawick, "the most dangerous of all delusions."[5] Why is it dangerous? Because persons who suppose that they know absolute truth absolutely will find little cause to tolerate a diversity of viewpoints. For them diversity represents an epistemological fall from grace; pluralism is the result of ignorance or sin. Diversity will end when the world recognizes the "plain truth," an end toward which those who claim to know it, are prepared to contribute by indoctrination and even force. In essence, when truth is viewed as absolute and self evident a universal value system which precludes diversity becomes a desirable objective.

Attacking this objective and the doctrine of "self evidence" which supports it, several communication theorists have opted instead for a consensual definition of truth.[6] From this perspective, truth is agreement. In its most radical form this view is interpreted to mean that degrees of agreement equal degrees of truth.[7] The popularity of this perspective is based in part on the assumption that if truth is seen as agreement, then there is no need to speak of an absolute truth in the name of which diversity has so often been repressed.

But, is a consensual view of truth necessarily consistent with a democratic respect for diversity? I think not; rather, Proposition II - Respect for diversity, on a universal scale, is weakened logically by the view that truth is agreement. This is the case for several reasons. First, agreement can be established by non-democratic means. If truth is agreement, agreements secured by

indoctrination, propaganda, censorship, brainwashing, and force are, therefore, true. Second, even if a consensual definition of truth is modified to read, "only agreements established through free discussion are true" the democratic process is weakened; for if truth is agreement there is no ideal above agreement in the name of which agreements once secured can be critically challenged. Of course, we might reason that as long as one dissenting voice remains, agreement is not complete so truth is up for grabs and discussion must remain open. But notice if as some communication theorists contend, degrees of truth equal degrees of agreement, then dissenting minorities must always speak falsely--a view which is inimical to a democratic respect for diversity.[8]

In essence, the view that truth is agreement[9] does not on a universal scale preserve respect for diversity; for if a near universal agreement would be obtained it could not, from this viewpoint, be respectfully challenged in the name of truth by a dissenting minority.

The effort to define truth as agreement suffers the same fate logically, that every endeavor to define truth explicitly sustains--either a retreat to circular reasoning, or an acknowledgment that truth transcends the proposed definition of it.[10] That is, if I say "truth is agreement" you can ask "how do you know that truth is agreement?" I can respond by saying "my associates and I have agreed upon it"--in which case my reasoning becomes circular and meaningful discussion ends. I must resort to some definition of truth in the name of which the view that "truth is agreement" is justified. In this case, I not only retreat from my position but invoke another definition of truth that will upon questioning suffer the same fate.

Truth it seems eludes my definition of it, and gratefully so; for truth in this transcendent sense invites continuous discussion and inquiry.[11] Therefore, Proposition III - Respect for Diversity is strengthened logically by the view that truth is absolute, but transcendent and not self-evident. Qualified as transcendent, the concept of absolute truth does not invite claims to absolute knowledge. Absolute truth as transcendent stands in judgment upon all claims to absolute knowledge and provides a goad for their revision through continuous discussion.

The concept of transcendent truth has, perhaps, received its most extensive discussion in the work of modern progressive theologians. For example, the Christian Paul Tillich suggests that God is absolute truth and as such stands in judgment upon all human claims to know the truth absolutely.[12] Here one might expect to hear that divine revelation through the agency of the Christian church makes clear the absolute and, therefore, by faith in the church one can distinguish with certainty between the validity of diverse viewpoints, but this is not Tillich's position. To say that God is absolute truth means that every concept of God--even a Christian concept of God, even Tillich's--is judged by that truth which is transcendent and as such eludes final difinition.

Notice the functional significance of Tillich's view. Absolute loyalty belongs only to God, but God is transcendent--therefore, every endeavor to grant absolute certitude to a particular point of view is idolatrous; every human perspective is conditioned, finite, and in need of endless revision in dialogue with alternative perspectives.

The concept of transcendent truth does not need to be identified with the religious term "God." Tillich himself often uses the term "the unconditoned" to designate the transcendent. Karl Popper says simply "truth is beyond human authority."[13] The philosopher Max Horkheimer prefers to speak of "the Infinite," or "the Other." Horkheimer argues, "a really free mind retains the notion of the Infinite as the consciousness that earthly happenings are finite . . . . this notion of the Infinite saves modern society from idiotic optimism and from the extension of its own finite knowledge into a new religion."[14]

In summary, when truth is seen as the transcendent, a belief about the truth--no matter how broadly based its acceptance might be--can never claim a final

authority over human minds or discussions; for every human perspective is finite, incomplete, and in need of revision before the transcendent. Unity may be sought, but diversity must be respected.

However, a sense of the transcendent only logically strengthens a democratic respect for diversity. The same awareness which chastens dogmatic claims to absolute knowledge, reveals the finite basis of democratic values as well. That is, the democrat who acknowledges the elusive character of truth must affirm the universal significance of his or her values in spite of uncertainty. Such uncertainty might weaken a democratic commitment psychologically,[15] but this is not necessarily the case; uncertainty does not preclude conviction.[16] Nor should one lacking a final authentication of his or her democratic values shrink in timidity from affirming them. For unless such an affirmation is forthcoming, democratic values will lack an advocacy of consequence amidst the din of ideological competition. Therefore, Proposition IV, respect for diversity is strengthened when, in spite of ultimate uncertainty, persons commit themselves to a democratic value system as a model for universal emulation.

It may seem as if such a commitment contradicts the respect for diversity it purports to embrace. Does not "respect for diversity" preclude commitment to a particular value system as a model for universal emulation? Should not one conclude that, "beyond individual preferences, all value systems are equally valid?" On the contrary, the view that "all value systems are equally valid" does not logically enhance respect for diversity.[17] We do not best respect all value systems by embracing the view that "all value systems are equally valid." For then, we would value equally that point of view which says "some value systems should not be accorded free expression." Diversity is best respected when we commit ourselves to that particular value system which says, "although all value systems are not equally valuable--a democratic system being pre-eminent--all should be granted free expression."

It is not possible to avoid commitment to a particular value perspective.[18] Even the view that all value systems are equally valid is--in a self contradictory way--a particular value commitment. The democrat who values "unity in diversity" is fulfilling the inevitability of axiological choice, but through a commitment which can be self consciously finite and rationally revised through discussion.[19]

Truth, Education, and Universal Values

Having treaded the somewhat murky waters of epistemology, I shall write now explicitly as an educator. Based on the preceeding discussion, what orientation toward diversity and values would I like my students to take with them into the 21st century?

First, I would like them to be keenly aware of the multiple value systems which presently comprise the social world. Such pluralistic awareness is, I believe, an affront to naivete, a prerequisite for effective communication across cultural boundaries, and the basis for the enrichment and revision of one's own frame of reference.[20]

Second, I would like my students to maintain an awareness of the transcendent dimensions of reality, an awareness of the Infinite, the Other, the Unconditioned, the Unconstructed. This awareness as Horkeimer notes, is the basis for that humility which casts into doubt every ideology which would demand unquestioned worldwide allegiance.[21]

Third, I would like my students to understand that the search for truth can never be reduced to a search for agreement. Let them seek agreement about the truth, but also let them be aware that no agreement about the truth however universally received can fully encapsulate the truth itself. Truth is absolute, elusive, and transcendent, and so it should be considered, for as Karl Popper has written, "[We must retain] the idea that truth is beyond human authority . . . . for without this idea there can be no . . . . criticism of our conjectures, no groping for the unknown, no quest for knowledge."[22]

Finally, I would like my students to understand that cognitive humility does not preclude firm convictions for a particular point of view. Sir Isaiah Berlin once endorsed the view that, "To realize the relative validity of one's convictions and yet stand for them unflinchingly, is what distinguishes a civilized man from a barbarian."[23] I would like my students to become as they enter the 21st century, in the words of Brenda Cohen "figures of consequence on the moral scene,"[24] even while realizing that their own standpoint might find revision through dialogue with others.

Endnotes

[1]"Speech Communication As the Primary Social Act: Toward a Universal Value System for the 21st Century," 65th Annual Meeting of the Speech Communication Association, November 11, 1979, San Antonio, Texas.

[2]Richard McKeon, "Communication, Truth, and Society," Ethics, 67 (1957), 88.

[3]Communication theory has in recent years been reawakened to the classical question: what is truth? Discussion of this question is frequently related to "respect for diversity." See Barry Brummett, "Some Implications of 'Process' or 'Intersubjectivity': Post Modern Rhetoric," Philosophy and Rhetoric, 9 (1971), 21-51; Chaim Perelman, "Rhetoric and Philosophy," Philosophy and Rhetoric, 1 (Winter 1968), 15-24; Robert Scott, "On Viewing Rhetoric as Epistemic" Central States Speech Journal, 18 (1967) 9-17.

[4]See Brummett, "Some Implications. . . .," Chaim Perelman, "The Idea of Justice and the Problem of Argument (New York: the Humanities Press, 1963), pp. 125-42; and Scott, "On Viewing Rhetoric as Epistemic."

[5]Paul Watzlawick, How Real is Real? (New York: Random House, 1976), p. xiii.

[6]See, for example, Brummett, "Some Implications . . . . ," Louise Karon, "Presence in the New Rhetoric," Philosophy and Rhetoric, 9 (1976), 96-111.

[7]See Brummett, 34.

[8]On this point see C. Jack Orr, "How Shall We Say: 'Reality is Socially Constructed through Communications?'" Central States Speech Journal, 29 (1978), 270; and Roger Trigg, Reason and Commitment (Cambridge: Cambridge Press, 1973), p. 5.

[9]Some attempts to relate truth to agreement are sufficiently qualified to allow a larger definition of truth and avoid the problems outlined here. See the discussion in Orr, "How Shall We Say . . . . ," 269.

[10]See William Bartley, "Rationality Versus the Theory of Rationality" in The Critical Approach to Science and Philosophy, Mario Bunge, ed. (London: Collier-MacMillan, 1964), pp. 3-31; see also David Bohm, "On the Problem of Truth and Understanding in Science," in Bunge, pp. 212-223.

[11]Joseph Agassi, Science in Flux, (Boston: D. Reidel Publishing Co., 1975), pp. 168-171.

[12]Paul Tillich, My Search for Absolutes, (New York: Simon and Schuster, 1967, see also Reinhold Niebuhr, The Children of Light and the Children of Darkness, (New York: Scribner's, 1944).

[13]Kark Popper, Conjectures and Refutations, (New York: Harper and Row, 1968), p. 29.

[14]As translated and paraphrased by Rudolf J. Siebert, "Max Hirkheimer: Theology and Positivism I," Ecumenist, 14 (1976), 21.

[15]For the relationship between uncertainty and commitment see C. Jack Orr's "Communication, Relativism, and Student Development," Communication Education 27 (1978), 83-98.

[16]Brenda Cohen, "Three Ethical Fallacies," Mind, 86 (1977), 78-87.

[17]See Geoffrey Hanisen, "Relativism and Tolerance," Ethics, 86 (1976), 122-135.

[18]Ibid.

[19]For the view that rationality is openness to criticism see Orr, "How Shall We Say . . . ," 271-273.

[20]For an elaboration of this view see Orr, "Communication, Relativism, and Student Development."

[21]See for similar views, Timothy M. Riorden, "Karl Jaspers: An Existentialist Looks at University Education," Educational Theory, 26 (1976), 113-120; and Huston Smith, "Excluded Knowledge: A Critique of the Modern Western Mind Set," Teachers College Record, 80 (1979), 419-445.

[22]Popper, p. 30.

[23]Isaiah Berlin, Two Concepts of Liberty, (Oxford: Oxford Press, 1958), p. 57.

[24]Brenda Cohen, 87.

DENIAL OF FREEDOM OF SPEECH IN JOCK YABLONSKI'S CAMPAIGN FOR THE UMWA PRESIDENCY

Richard J. Jensen
University of New Mexico

Reformers rarely find it a simple task to get their message to potential adherents. Often they are frustrated not only by the nature of their opponents, but by the type of organization in which the reforms are being proposed. Perhaps the most difficult type of organization in which to achieve reform is one like the United Mine Workers of America (UMWA) whose leader has absolute control over the structure of the group and whose traditions, as a consequence of that leadership, discourage either democratic or innovative practices. Surely such policies limit the type of rhetoric accepted within that organization.

Since 1919, the UMWA has been controlled by domineering leaders. John L. Lewis set the tone for this type of leadership in the forty years (1919-1959) that he served as president of that union. Lewis dominated the union completely by ruthlessly eliminating any challenges to his leadership. Lewis eliminated challengers by crushing them in union elections, by controlling all aspects of the union and, if all else failed, by forcing them out of the union. The only real election challenge Lewis faced was in 1926. In that election Lewis defeated his opponent, John Brophy, by destroying Brophy's reputation and by using union funds and employees in his campaign.[1] Lewis so devasted Brophy that no opponent every seriously challenged him again. Lewis gained control of all aspects of the union by appointing officers of local unions and districts even though the union's constitution called for the election of such officers.[2] Lewis argued that such behavior was necessary in order to maintain solidarity in the union. Lewis also eliminated opponents by charging them with "dual unionism," the holding of membership in other labor organizations in violation of the union constitution.[3] Aware that several powerful opponents had been eliminated by these means, other potential dissidents thought carefully before challenging Lewis. Lewis' leadership rested on one policy; he demanded unreserved loyalty, and in return he gave full loyalty. The members of the union followed Lewis "with the docility of children."[4]

By the time Lewis retired in 1959, his style of leadership was so accepted that his successors, Thomas Kennedy and William Anthony "Tony" Boyle, and the rank-and-file members followed it without question. This style of leadership placed restrictions on all of the ways in which a member could question the union leadership. Free communication with union members was restricted by the leader's control of tradition, of communication channels, and the union's structure.

In 1964 the first break in the absolute authority of a UMWA leader occurred.. In that year the union's president, William Anthony "Tony" Boyle, ran roughshod over his opponents at the union's convention in Miami Beach. When one of the men attempted to speak against Boyle, he was physically beaten and carried from the hall, an obvious denial of freedom of speech. One of the men beaten, Steve "Cadillac" Lochis, challenged Boyle and received 19,000 votes in the union election held later that year.[5]

Five years later, Boyle was opposed by an attractive, powerful member of the union's hierarchy, Joseph A. "Jock" Yablonski. Yablonski had the credentials potentially to defeat Boyle in a fair, open campaign, but Boyle used his control over the union to turn back Yablonski's challenge. This paper will detail the reasons why Yablonski decided to challenge Boyle and the restrictions on freedom of speech Yablonski faced in the United Mine Workers. Those restrictions on freedom of speech were, in a large measure, responsible for Yablonski's defeat.

Origin of the Yablonski Movement

In 1969 Boyle faced serious opposition because of his ineffective leadership. Boyle had attempted to copy the leadership style of John L. Lewis but failed. He "tried to carry on in the Lewis tradition but without the Lewis style."[6]

The UMWA suffered from "hardening of the leadership arteries, a malady brought on by more than four decades of Lewis rule and the old warrior's appointment of Boyle as his successor."[7] Under Boyle the UMWA "deteriorated into a cruel parody of its former self."[8] Boyle simply lacked leadership traits. "Tony Boyle was a far different human being, more mortal, more insecure, more frightened of the realities around him."[9] Lewis was often ruthless, a trait shared by Boyle, but Lewis was an extremely capable administrator. Lewis carefully controlled every aspect of the union, but Boyle found the tedious day-to-day problems of running the union boring, so he allowed his administrative assistant, Suzanne Richards, to handle many of his chores.[11] Under Boyle "any significant leadership" came from the local union presidents.[12] Boyle lost influence with many of the rank-and-file of the union. The coal industry was plagued by a series of wildcat strikes that dramatically cut production in 1969 by "an estimated 20 million tons."[13] The miners" . . . walked out in defiance of their union over local grievances supposedly covered in contract arbitration procedures. The strikers often complained more about the lack of backing from their union in grievances than they did about the grievance itself."[14]

Because of their displeasure with Boyle's leadership, three rank-and-file miners announced their candidacy for the presidency of the UMWA.[15] While these three candidates were still in the process of organizing their campaigns, an influential critic of the Boyle administration, Ralph Nader, helped bring a better-known candidate into the race.[16]

On May 30, 1969, reporters were summoned by Nader to the Mayflower Hotel in Washington, D.C. for a press conference. At the press conference, Joseph "Jock" Yablonski, a member of the union's International Executive Board, announced his candidacy. Three "hefty young men in business suits" guarded the room because of Yablonski's fear of violence.[17]

Challengers within the union knew they faced potential retaliation from the union leaders. The fears of violence were not without reason. Later in the campaign Yablonski and his supporters were threatened, shot at, and beaten up, and after the campaign Yablonski was murdered. This climate of fear obviously limited the potential of a rival to the union presidency. It did not allow Yablonski to have the free interaction he needed to convince the miners to support his candidacy.

At the news conference, Yablonski stated that he decided to challenge Boyle because of "the shocking ineptitude and passivity of the union's leadership" and because Boyle had fired him as President of District 5 (Southwest Pennsylvania) in 1966.[18] Yablonski had been removed as the President of District 5 because he had "annoyed Boyle by running without authorization from headquarters for the union vice-presidency in 1964."[19] Such behavior by the union's president limits the possibility of expressing grievances within the union. Yablonski explained his reasons for running: "I do so out of a deep awareness of the insufferable gap between the union leadership and the working miners that has bred neglect of the miners' needs and aspirations and generated a climate of fear and inhibition."[20]

Yablonski was the highest ranking officer ever to challenge a UMW president. He was not an average miner but "an insider, a union loyalist for 36 years . . . he knew how the union worked, its wheelings and dealings and where the skeletons were buried."[21] Yablonski seemed to have the leadership traits which qualified him for the presidency of the UMW. He had been "one of John L. Lewis' trusted trouble-shooters."[22] Yablonski had a reputation in the union "for being a tough negotiator and wheeler-dealer adept at grabbing plums for the union."[23] He respected Lewis' type of leadership and "saw himself cast in the same mold."[24] Although he had been in the union hierarchy for a long time, Yablonski had not lost contact with the rank-and-file. "He identified strongly with the coal miners, was sympathetic to the point of outrage with their grievances."[25] If he could get his message to the miners, Yablonski might be able to defeat Boyle.

Yablonski was a talented campaigner who "liked to pull down his tie and

make the rafters ring with his tough-voiced, somewhat florid oratory."[26] Yablonski modeled his oratory after John L. Lewis. In his book, Coaltown Revisited, Bill Peterson described Yablonski's campaign style: "In the old Lewis tradition, Yablonski spoke without notes, often reciting lengthy statistics from memory. Frequently he lapsed into outbursts of profanity. As he talked, he'd loosen his tie. Off would come his suit coat, and his left hand would tug at his trousers, hitching them up to keep them from sagging below his paunch."[27]

Like the style of UMWA leadership, the style of campaigning in the union had to conform to the Lewis model. The miners would not go beyond traditional norms. Since a man had to campaign in the same manner as Lewis to be successful with the miners, another subtle type of constraint was placed on expression within the union.

Arguments in the Campaign

Although Lewis had shortcomings, he was an effective, beloved leader. Boyle, however, proved to be a weak and ineffective leader. Because of his ineffectiveness he could be attacked in five major areas:

1. Disregarding democracy in the union;
2. Being too close to the leaders of the coal industry;
3. Ignoring the needs and desires of the rank-and-file members;
4. Being guilty of nepotism and misuse of union funds;
5. Stopping the union from going beyond present practices and from improving social conditions in coal mining regions.

Although the leadership of the UMWA claimed the union was democratic, they did not allow it to function in such a manner. Thus, Yablonski's major attack focused on the lack of democracy in the union. Boyle's leadership practices showed his "low regard . . . for the rank and file exercise of democracy."[28] This lack of democracy was evident in the union's leadership. Although the union constitution required the election of the International Executive Board, 17 of the 23 members were appointed by Boyle and were loyal to him. Yablonski was one of the six elected members.[29] The leadership of the union was thus composed of a group of men who owed their jobs to Boyle. In the Lewis tradition, they were careful not to allow any dissent within the orgnization lest they be seen as disloyal.

Yablonski called for "full union democracy."[30] He charged Boyle with keeping power through a "rigged financial system in all districts and locals."[31] Yablonski wanted to change practices so the rank-and-file "could vote regional officials who refuse to represent them out of office."[32] In his election Bill of Rights, Yablonski called for the UMW to return to the ideas stated in the UMWA constitution:

1. Comply with federal law by insuring the right of members to elect all district officers.
2. All elections must be secret ballot, and all Districts must be apportioned by a one-man, one-vote basis.
3. Insure the right of freedom of speech for all members without fear of retaliation from Washington or District offices.[33]

This lack of democracy in the union, according to Yablonski, allowed the leaders to engage in practices which were not in the best interests of the United Mine Workers. For example, Boyle and his supporters were charged with being too close to the leaders of the coal industry. According to Yablonski, "The coziness between coal operators and Boyle and his district officials has damaged the cause of coal miners everywhere."[34] Yablonski accused Boyle of

meeting "regularly in secret with coal executives."[35]

Yablonski charged that Boyle had gotten so close to the coal industry that he had forgotten his basic obligation to the rank-and-file and had violated past practices of the union. For example, Yablonski documented the fact that Boyle had negotiated secret sweetheart contracts with companies, a violation of the union's constitution.[36] Union members also had no voice in the negotiation of contracts nor could they vote on the negotiated contract--again in violation of the union constitution.

Because Boyle was so close to the operators, Yablonski blamed him for ignoring the needs and desires of the rank-and-file, especially in the areas of health and safety and pensions. The UMW leadership was accused of "failing in its obligation to protect the membership from safety risks and health hazards."[37] Yablonski could refer to the deaths of over 300 miners in 1968 and Boyle's support of Consolidation Coal during the Farmington, West Virginia disaster on November 20, 1968.[38]

As a further defense for miners, Yablonski's "Bill of Rights for Miners" proposed "New basic agreements with operators that must include contractual safeguards against risks and hazards caused by increased mechanization."[39] The Bill of Rights also added that union leaders should "lead a fight for full compensation for 'Black Lung' and other work-related disabilities."[40]

Yablonski knew that miners were openly resentful of their "niggardly pension system" which gave them only $115 a month after 20 years, while Boyle could retire at full pay" of $50,000 a year.[41] Yablonski called for a raise "in the present royalty of 40 cents to 60 cents so pensions can be increased to at least $200 a month."[42]

The lack of democracy in the union also led to misuse of union funds and nepotism in the union. Yablonski called the miners' attention to "distressing talk about fat salaries for union officers," and "members of families being placed on union payrolls."[43] Richard Boyle, Tony's brother, president and secretary-treasurer of District 27, drew a salary of $25,000 plus an expense account, and Antoinette Boyle, Tony's daughter, drew $40,000 a year as an attorney in the same district. Yablonski proposed that such abuses be eliminated.

In addition to calling for an end to nepotism and several oppressive leadership practices, Yablonski proposed moving into new areas not traditionally considered by UMW leaders. He asked for reforms in education and social conditions in the coal fields so that the personal lives of miners could be improved. Yablonski called for "state and local taxes in the poverty stricken Appalachian coal fields to finance sweeping reforms in education and other government services."[45] Such reforms would be departures "from the settled and tranquilizing practices of the past."[45] Past UMWA leaders were not innovative; they simply continued in the traditional mold.

Clearly, Yablonski found himself with an opponent who could be attacked. Boyle was pictured as being too authoritarian, too close to the coal industry, and not concerned with the needs and desires of the miners. While Yablonski hoped his attacks on these issues would bring him victory, he knew that his battle against those traditions, once based on the Lewis style and now identified with the Boyle administration, would be a hard fought one.

Yablonski was limited in his ability to get his messages to the members of the UMW because of three conditions that existed during the Boyle dominated era: 1) the union's traditions concerning leadership style, 2) lack of democracy in the union, and 3) the type of rhetoric that could be used in the UMW. These practices, some subtle, others more blatant, in effect denied Yablonski the right to speak openly with the membership.

The United Mine Workers has a strong leadership tradition personified by John L. Lewis. Lewis had so stamped the union with his style of leadership that

anyone who followed was automaticallly compared to him. Yablonski, though a Lewis loyalist who resembled Lewis in many ways, had to overcome the fact that John L. Lewis had personally appointed Boyle to the presidency in 1963. Yablonski could never effectively combat Boyle's image as Lewis' handpicked successor. Boyle's followers could easily tie him to Lewis. Rex Lauck specified one of the ways in which Boyle and Lewis were typically linked: "Tony Boyle is a fighter in the tradition of John L. Lewis."[47]

Lewis died during the election campaign of 1969, but much of his ethos remained with Boyle. Yablonski explained his problem in dealing with the issue of John L. Lewis: "Tony Boyle is trying to win votes by charging that I have defamed the name of John L. The fact is that Lewis is not an issue in this campaign. Lewis is a legend--I'm campaigning against Boyle's record."[48] A further problem was that in attacking Boyle, Yablonski was by implication attacking Lewis. This problem was one Yablonski could never overcome.

Lewis' powerful personality dominated all aspects of the UMW; he allowed little dissent within the union and expected the members to follow his dictates. Boyle sought to imitate his leadership tactic, thus any candidate faced problems because the members of the union simply were not used to seeing the decisions and actions of the president questioned. An audience within the union would thus be difficult to persuade because they were used to being told what to do rather than having input into decision-making.

Yablonski not only faced problems in dealing with leadership tradition but also in the use of traditional rhetoric. Kathleen M. Hall Jamieson illustrates Yablonski's problem: "Some rhetors are more constrained by genre than others because of their sense of the presentness of the past."[49] According to Jamieson, in a "tradition-bound institution . . . a set of standardized forms" of rhetoric are established.[50] This institutionalized rhetoric creates "expectations which any future institutional spokesmen feel obliged to fulfill rather than frustrate . . . When the rhetorical parameters established . . . are overstepped, reaction is provoked."[51] Because of the long-standing traditions concerning rhetoric in the UMW, Yablonski was forced to use the institutionalized rhetoric. Because a typical UMWA audience was so tied to the rhetoric of the past, Yablonski was limited in what he could say and in how he could say it. If he had gone beyond the substance and style of the rhetoric used by Lewis, Yablonski probably would have alienated his audience.

This institutional rhetoric did not limit Yablonski's access to the audience but it did limit the arguments he could discuss with a group of UMWA members. Because of the limited number of topics he could incorporate in his campaign rhetoric, Yablonski was, in effect, arguing the same issues discussed in the 1926 election between Lewis and Brophy because the audience simply would not allow him to move beyond the rhetoric defined by Lewis. This situation was a subtle limitation on speech but a powerful one.

Controls on Channels of Communication

Boyle's dominance extended to all aspects of the union's communication channels. Yablonski's campaign manager, Mike Trbovich, claimed that Boyle went to such lengths as having all phone calls entering and leaving union headquarters go through a single switchboard so he could monitor them. He also claimed that Boyle restricted the ways in which people could physically move from one part of the union headquarters to another. Both of these actions were instituted, according to Trbovich, so that Boyle could control all communication patterns within the union and especially those within union headquarters.[52]

In the election Boyle had a distinct advantage because of his control over the two most important channels of communication, the United Mine Workers Journal and television. Because a large number of miners often live in coal camps in the mountains, and because "only the ubiquitous television set and, to a lesser extent, the UMW Journal succeed in penetrating these remote mining hollows,"[53] Boyle's control of these channels of communication gave him a great

advantage over Yablonski in getting his message to the men.

Boyle had absolute control of the Journal and exploited its power. The Journal was a tremendous force because it was often read avidly by miners. The membership of the union tended "to rely on the official UMW Journal for its union political news."[54] Boyle dominated the Journal's editor and staff, thus controlling the political information the miners received.

In 1972 Judge William B. Bryant ordered Boyle's victory over Yablonski nullified. In his decision, Judge Bryant extensively outlined how Yablonski was denied access to the Journal. Bryant summarized by stating that, "Journalistic policy is subject to the direct influence of President Boyle."[55] He then outlined Yablonski's treatment.

> A none too subtle clue to the determination to use the Journal as an effective campaign sheet is revealed when we note that up to the time Yablonski announced his candidacy he had been mentioned and pictured in the Journal on several occasions. Thereafter we have an entirely different picture. . . . Yablonski's announcement of his candidacy though featured in the commercial press, was accorded not one word of mention in the Journal. In the five issues from June 15 to September 15 there were no less than 166 references to Boyle . . . along with 16 pictures depicting his various activities . . . no mention was made of Yablonski's similar activities . . .[56]

Miners did not attend rallies for either candidate in large numbers, so Boyle had the advantage when he bought virtually all available television time near the end of the campaign. It was estimated by Yablonski's supporters that Boyle spent at least $25,000 on television spots. Yablonski supporters charged that much of this money came from union funds. Such use of union money was illegal under current labor laws. Yablonski did not have the financial resources to match Boyle. This lack of funds placed a serious restriction on his access to the rank-and-file.

Because he could not get Journal coverage, and because he could not afford to buy advertising, Yablonski's major appeal was through personal contact with the miners. He chose to go directly to the miners in order to make himself better known and to emphasize that as a leader he would stress personal communication. Since Boyle had little personal contact with the miners, Yablonski sought to dramatize this difference.[58] Yablonski "drove mine to mine in his Chevy, often accompanied only by his nephew, Eddie Yablonski, a high school social studies teacher and an ex-marine."[59] Edward Cox described a typical Yablonski rally: "Yablonski spoke to a small group of miners in the bleachers of an old and neglected field in Matewan, W. Va. News of the meeting was passed around by word of mouth. Three union district representatives were present, writing down the names of those they recognized."[60] The union officials tried to control the miners who would go to Yablonski rallies by threatening them with union sanctions and by forcing Yablonski to hold rallies under adverse conditions. Once again the power of union leadership, and a consequent lack of democracy, limited Yablonski's ability to speak to the miners.

The choice of personal contact with the miners was probably a wise rhetorical tactic, but in order to win, Yablonski needed exposure to the miners. He came across well in person; "he looked, acted, and sounded like a labor leader," but he soon discovered that he was not free to campaign in many "of the more violent coal mining areas of the Unites States."[61] At one point a newspaper advertisement warned Yablonski to stay out of Harlan County, Kentucky, and he was physically attacked while on a campaign trip to Illinois. Yablonski's campaign was eventually limited to areas where he knew he was physically safe.[62] After the attack much of the energy of the Yablonski campaign was lost. The result of these threats was to deny Yablonski the opportunity to speak fully with union members, and thus to undercut one of his most effective campaign tactics.

Institutional Structure

As the details of union tradition suggest, the powers of the incumbent in the UMW were immense. Boyle controlled the union totally. With respect to the election, Boyle's control of the election machinery and miners' benefits helped secure his reelection.

The first obstacle Yablonski had to surmount was to get nominations from 50 local unions. Boyle's supporters used questionable tactics to stop Yablonski from attaining his goal; "supporters of Yablonski are alternately offered jobs on the union pay roll and threatened with the loss of their company jobs."[63] Local union officials were offered $150 to $200 to coerce their locals into nominating Boyle. The situation became sufficiently flagrant that Boyle was warned by the Labor Department to cease his actions. The Labor Department's pressure may have helped because Yablonski received 96 nominations, nearly twice the number required.[64]

Boyle tried to control the election machinery by not allowing Yablonski to get accurate membership lists or distribute literature through union channels. Late in the campaign, Yablonski successfully sued for the right to get the lists and to mail literature at union expense.[65] Obviously, Yablonski's inability to get such lists early in the campaign placed a serious restriction on his ability to get his ideas to the membership.

Because of his position, Boyle had power over union members in regard to pensions and hospital cards. Boyle was a trustee of the union pension fund and exercised a great deal of control over it. When Yablonski effectively argued early in the campaign that $115 a month pension was inadequate, Boyle neutralized the argument by forcing a $35 a month raise. Many retired miners relied on the pension for their total livelihood; these miners supported Boyle out of respect because he signed their checks and because of their fear that he would cancel their pension if they supported Yablonski. Boyle also held control over union members' hospital cards. These cards guarantee that the UMW will pay all medical expenses incurred by a miner and his family. Again the men respected and feared Boyle due to his control over their health care as well as their incomes.

Men who were so indebted to the union for their livelihood were unlikely to vote for a challenger to the union presidency no matter how logical his arguments. Boyle's chief support came from the older members of the union. These men simply were not willing to question the union's leader.

Boyle's internal control of the union forced UMW employees to support him financially. Judge Bryant explained: "The reelection campaign of Boyle. . . . was financed in part through contributions . . . of $142,710 in contributions from 229 persons, virtually all of whom were on the union payroll in 1969. Examination of the various contributions discloses a very definite relationship between their amount and the salary bracket of the contributors."[68]

Internally, Boyle also controlled the election machinery of the union: "Yablonski could not obtain the addresses of the various locals from the International, nor was he given any information as to the polling places. . . . At the time of the election he had between fifty and sixty percent of the total number of locals covered by observers."[69] Yablonski also discovered many violations of the federal labor laws that occurred during the actual voting. On election day there was illegal campaigning in election areas, harassment of Yablonski poll watchers, no secret ballot, not enough ballots in pro-Yablonski areas, and many Yablonski supporters did not even know where voting occurred.[70]

Results

The election was held on December 9, 1969, and Boyle won by 81,056 votes to 45,872 for Yablonski.[71] In spite of his defeat, Yablonski pledged to carry on his battle against Boyle. The battle was short. On January 5, 1970, Kenneth Yablonski went to his family's home to investigate because no one was answering

the phone. He found the murdered bodies of Jock Yablonski, his wife, Margaret, and his daughter Charlotte.

Perhaps murder is the ultimate means of denying freedom of speech. In Yablonski's case, some observers felt he was murdered in order to stop him from testifying before congressional committees about corruption in the UMWA. Whatever the reason, Yablonski's murder was probably Boyle's final attempt to silence oppostion within the union.[72]

With the murder of Yablonski, Boyle gave dissidents within the UMWA a martyr and a cause. In April of 1970 a group known as the Miners for Democracy (MFD) was formed to challenge Boyle. In 1972 the MFD successfully had the 1969 election overthrown. In an election carefully monitored by the Labor Department, the MFD, led by Arnold Ray Miller, defeated Boyle in the 1972 election by a vote of 70,373 to 56,334.[73]

Although Yablonski lost the 1969 election, he called attention to abuses of freedom of speech in the UMWA. In 1972 the MFD ran with the ability to have full access to the miners. Thus, Jock Yablonski made a significant contribution in returning freedom of speech to the UMWA.

Endnotes

[1]Brophy described Lewis' tactics: "He made no effort to discuss my platform or even to refute my charges. I was charged with dualism, disruption, trafficking with outsiders of various kinds from Communists to capitalists." John Brophy, A Miner's Life, ed. John O. P. Hall (Madison, 1964), p. 215. The arguments used against Brophy were used by Boyle in the 1969 election against Yablonski. This example shows how UMWA leaders were tied to the past tradition of the union.

[2]Lewis created a system of trusteeships, whereby the international union assumed control over a district and then appointed officers to run those districts. The practice existed until 1972. For a description of how Lewis created the trusteeships, see: Saul Alinski, John L. Lewis: An Aunauthorized Biography (New York, 1949), p. 138.

[3]Dual Unionism was defined by the UMWA Constitution: "Any member accepting membership in the Industrial Workers of the World, the Working Class Union, the One Big Union, or other dual organizations, or membership in the National Chamber of Commerce, National Association of Manufacturers, or the Ku Klux Klan, or the Communist Party, or the Facist, Nazi or Bund organizations, shall be expelled from the United Mine Workers of America, and is permanently disbarred from holding office in the United Mine Workers of America." See: Constitution of the International Union: United Mine Workers of America (Washington, D.C., 1968), p. 49. Although the quotation is taken from the 1968 edition of the constitution, the quotation has appeared in all previous editions of the document.

[4]"Exit John L. Lewis," Newsweek, 73 (23 June 1969), 31.

[5]Ben A. Franklin, "Boyle Claims Victory in Mine Union Race," New York Times, 11 Dec. 1969, Sec. 1, p. 29. Boyle defeated Koches 95,000 to 19,000 votes.

[6]"Lewis Heir Faces Revolt," Business Week (15 Nov. 1969), 84.

[7]"Successful Revolt," Newsweek, 74 (15 Dec., 1969), 84.

[8]Trevor Armbrister, "The Coal-Black Shame of the UMW," Reader's Digest, 97 (Oct., 1970), 136.

[9]Joseph E. Finley, The Corrupt Kingdom (New York, 1972), 237.

[10]"Lewis Heir Faces Revolt," Business Week, (15 Nov. 1969), 110.

[11]The fact that Boyle allowed a woman to run the union was seen by many miners as a sign of weakness.

[12]Robert G. Sherrill, "Black Lung Rebellion," The Nation, 160 (28 April 1969), 529.

[13]Uniontown, Pennsylvania Morning Herald, March 13, 1973, p. 1.

[14]Ibid.

[15]The three miners were: Elijah Wolford of Morgantown, West Virginia, Basil A. Callen of Morgantown, and Steve "Cadillac" Kochis, Boyle's 1964 opponent.

[16]Nader had become an opponent of Boyle after his research group had done an investigation on health and safety in coal mines. The Nader study group documented the fact that Boyle had failed to work to improve conditions in coal mines. Because of Nader's activism he and Boyle became bitter enemies. Boyle at one time even challenged Nader to a fist fight.

[17]New York Times, May 30, 1969, p. 9.

[18]"Board Member opposes Boyle for Presidency of Mine Union," New York Times, 30 May, 1969, p. 9, cols. 2-3.

[19]New York Times, 13 June, 1969, p. 24.

[20]"The Mine Workers' Revolt," Newsweek, 73 (16 June, 1969), 24.

[21]Bill Peterson, Coaltown Revisited (Chicago: Regnery, 1972), p. 97.

[22]Ibid, p. 98

[23]Ibid, p. 98

[24]Brit Hume, Death and the Mines (New York: Grossman Publishers, 1971), p. 170. Hume further states: "he [Yablonski] revered the old man [Lewis], loved his combative spirit, thrilled to his rhetoric." Yablonski saw Lewis and himself as "rugged and proletarian, but able and clever and possessed with the magic of leadership."

[25]Hume, p. 169

[26]"Lewis Heir Faces Revolt," Business Week, (November 15, 1969), 110

[27]Peterson, p. 103.

[28]Edward Cox, "The Miners Play Rough," New Republic,(2 Aug. 1969), 13.

[29]Ben A. Franklin, "Rank and File Rebellion Stirs in Mine Union, Posing Threat to Lewis Legacy," New York Times, 13 June 1969, p. 24, col. 4.

[30]Joseph A. Yablonski, "Bill of Rights," Yablonski Campaign Literature. Copy in possession of author.

[31]Ibid.

[32]Ibid.

[33]Ibid.

[34]Business Week, (November 15, 1969), 112.

[35]Ibid.

[36]Ibid.

[37]"A Deadly Venom," Time, (19 Jan. 1970),p. 19.

[38]Ibid.,

At the Farmington disaster, in which 78 men were killed, miners, remembering the outrage Lewis showed at such disasters, were shocked at Boyle's pronouncement that "as long as we mine coal, there is always this inherent danger." He then praised Consolidation Coal, the owners of the mine, for being "one of the best companies to work with as far as cooperation and safety are concerned." The miners were upset and shocked to find the head of their union defending a coal company they felt responsible for the loss of 78 lives.

[39]Yablonski, "Bill of Rights."

[40]Ibid.

[41]Hume, p. 94.

[42]Ibid.

[43]"Successful Revolt," Newsweek 73 (15 Dec. 1969), 84.

[44]"Successful Revolt," p. 83.

[45]Yablonski, "Bill of Rights."

[46]Ibid.

[47]Rex Lauck, "A Brief Editorial," United Mine Workers Journal, February 15, 1970, p. 84.

[48]Newsweek, 73 (15 Dec. 1969), 84.

[49]Kathleen M. Hall Jamieson, "Generic Constraints and the Rhetorical Situation," Philosophy and Rhetoric, 6 (Summer 1973), 165.

[50]Ibid., p. 165.

[51]Ibid., p. 167.

[52]Personal interview with Mike Trbovich, Washington, D.C., January 8, 1974. Trbovich served as Yablonski's campaign manager.

[53]Hume, p. 94.

[54]"Boyle Urges Vast Reforms for Miners' Union," New York Times, 2 Sept. 1969, p. 25, cols. 3-5.

[55]William B. Bryant, "Order and Opinion of Judge Bryant in Election Case," United Mine Workers Journal, July 1, 1972, p. 5.

[56]Ibid., p. 5.

[57]"Mine Union Leader," New York Times, 11 Dec. 1969, p. 28, cols. 3-4.

[58]Boyle seldom met with the rank-and-file. He mainly campaigned at mass rallies with little or no interaction with the rank-and-file.

[59]Peterson, p. 103.

[60]Cox, p. 13.

[61]Hume, p. 206.

[62]In Illinois Yablonski was struck from behind by a karate chop. After that incident, much momentum was lost from the campaign because Yablonski became cautious about where he would campaign. This caution lost him many of his early supporters like Ralph Nader.

[63]Cox, p. 13.

[64]"It's too late for Yablonski," The New Republic, (31 Jan. 1970), 8.

[65]Yablonski had to sue Boyle several times during the election; he won all the suits.

[66]The pension had been started by Lewis. The miners seem to believe that the president of the union is responsible for their money and give respect based on that assumption.

[67]The author is from a mining family and can testify to the power a union president can exert in this area. Few retired miners voted against Boyle in the election.

[68]Bryant, p. 6.

[69]Bryant, p. 7.

[70]Bryant, p. 9.

[71]Justin McCarthy, "Boyle, Titler, Owens Win," United Mine Workers Journal, December 15, 1969, p. 5.

[72]Boyle was convicted of Yablonski's murder on April 11, 1974. In January of 1977 he won a new trial on the grounds that he was prevented from presenting a complete defense in his trial. Boyle was retried and convicted of three counts of first degree murder on February 19, 1978. Albert Pass, a union official who was also convicted of Yablonski's murder, described Boyle's reason for having Yablonski murdered: "On December 16, 1969, Toy Boyle called me at my home and he told me 'Yablonski got beat bad and now he's still going to cause serious trouble over the money that has been spent on labor's non-partisan league!" The Non-Partisan League is the UMWA's lobbying unit. The quotation by Pass appears in "Yablonski Killer Testified In Hope of Lesser Sentence," New York Times, 3 Feb. 1978, p. A12, col. 6. For a description of Boyle's second trial see: "Boyle Is Convicted Again in '69 Slaying of Union Opponent," New York Times, 19 Feb. 1978, p. 26, cols. 3-4.

[73]For a thorough study of the Miners for Democracy see: Richard Jay Jensen, "Rebellion in the United Mine Workers: The Miners for Democracy, 1970-1972," Diss. Indiana University, 1974.

SAMUEL M. (GOLDEN RULE) JONES: UNORTHODOX CHAMPION OF FREE SPEECH

Paul H. Boase
Ohio University

Reforms--social, economic, religious, and political--grow from the seeds of protest and dissent, nourished in a soil of free expression. During the "Gay Nineties" the sowers who went forth to sow were a wierd, wild, exciting montage of populists, progressives, socialists, anarchists, prohibitionists, greenbackers and grangers, muckrakers and municipal reformers who exercised their first amendment rights freely, using nearly every available means of persuasion. Among the most intriguing of these reformers was Samual Milton Jones, the champion of municipal democracy, the Golden Rule Mayor of Toledo from 1897 until his untimely death at 58 in 1904. He is of particular interest to the student of free speech since his social philosophy and the political and economic reforms he promoted were based on the same fundamental premises that support first amendment rights. His childlike faith in pure democracy--for him synonymous with literal Christianity--his reliance on unlimited verbal persuasion to accomplish reform, make him a figure worthy of our attention.

Life for Golden Rule Jones did not really begin until 1894 at the age of 48. A Welsh immigrant, he arrived in America as a child of three, received only thirty months or less than three years of formal education, worked as a farmer, helped man a river boat and then found his niche as a boom and bust oil driller in western Pennsylvania. At age 29 he married and during the next ten years fathered three children, but then, tragedy struck. His wife and baby daughter died suddenly leaving him with two boys to raise. To relieve his depression, he moved to a new oil boom area around Lima, Ohio. There he actively supported church and YMCA work, fell in love again and married Helen Beach, the church organist. The couple settled in Toledo in 1892.[1]

By 1894 Jones had accumulated a fortune of half a million dollars, largely through his invention and patent of a better sucker rod for pumping oil and his establishment of a factory--the Acme Sucker Rod Company--to manufacture the gismo.[2] At about that same time Jones also struck oil rhetorically and for his last ten years he spoke more from the platform, pulpit and political stump than most orators manage in a lifetime. The Samuel Milton Jones Papers, discovered in the attic of his factory in 1960 and put on microfilm in 1978 (15 rolls and 15,000 items) cover the last eight years of his life. One of the rolls preserves 210 of his speeches and articles delivered and published in various parts of the country. Eleven rolls contain letters to and from a wide variety of leaders, including such figures as William Jennings Bryan, Clarence Darrow, Jane Adams, Samuel Gompers, Henry D. Lloyd, Lincoln Steffens, Horace Mann, Carrie Chapman Catt, Eugene Debs, Edwin Markham, William Dean Howells, and a host of others. In less than one month in 1903 more than 20 requests for speeches came from churches, schools, Chautauquas, and labor unions.[3] Indeed, much of his voluminous correspondence concerned speaking trips, reform conferences, campaign strategies, and requests to reprint his speeches.

As Jones struck it rich and as the unemployed dregs of Toledo swept down on the Acme Sucker Rod Plant during the depression of the mid 90's, this successful business man, in a state of shock, searched his soul and asked himself what right he had to be wealthy and comfortable when "other men, by nature quite as good as I, and willing to work, willing to give their service to society, were denied the right even to the meanest kind of existence."[4] Almost simultaneously he came under the spell of the dynamic oratory of the flaming Christian Socialist Jeremiah from Grinnel College, the Reverend Dr. George D. Herron.[5] Although Jones confessed his inability to understand all the logical and philosophical involutions in Herron's reasoning and rhetoric,[6] he completely submitted to Herron's new altar call to sin-sodden industrialists and "Robber Barons" to make "the market place as sacred as the church" and even "be financially crucified in order to establish the world's market place on the Golden Rule basis."[7]

One morning at breakfast, Jones turned to his wife and suddenly announced that he was going to tack up and establish one and only one rule at his plant--the Golden Rule. Her logical response was that such an act would probably cause trouble.[8] Certainly in a Christian setting or community, either of two actions is likely to cause trouble: Deny the truth of Christianity or live the truth literally. From that day forward, Samuel Jones strove mightily and with remarkable consistency to follow the Sermon on the Mount and practice the Golden Rule. At Acme Sucker Rod no employees were quizzed about their habits, morals, health, or religion. There were no supervisory bosses; every man kept his own time sheet and worked at his own pace; the minimum wage was raised; an eight-hour day with paid vacations was established plus an insurance program, a profit sharing system and a company cafeteria that operated at a loss: benefits virtually unheard of in that day.[9] To Jones who became increasingly socialistic--sometimes referred to as a Tolstoyan anarchist[10]--the cause of all "misery, wretchedness, want, poverty, and crime" was man's continual denial of brotherhood and equality, demonstrated most devastatingly in the competitive, dog eat dog, capitalistic system.[11]

In speech after speech he proclaimed the efficacy of a gospel of love, freedom, and equality for all--black, white, yellow, or red--male and female. He rejected and labeled as false, the commonly accepted notion of success.[12] "Let us look at the form of injustice that made the success of the Acme Sucker Rod Company possible." Then he pointed his finger at "the injustice of a patent." In rhetoric that sounded like a George D. Herron sermon, Jones optimistically pointed to the "ideal society that yet awaits us, in the co-operative commonwealth that is to be realized, in the Kingdom of Heaven that is to be set up here on this earth, there will be no patents, no railroad passes, no reserved seats, no 'free list,' no franchises, contracts or special privileges of any sort to enable a select few of the people to live off the toil of others."[13] On many occasions he pointed to himself and said, "I find the inventor with his much-vaunted 'superior ability' is, after all, only a very dependent creature, much the same as all the rest of us--just a very small cog in the social wheel."[14]

Jones' entry into politics and his subsequent success was another fluke filled with startling surprises. The notorious Ohio Hanna and Foraker machines at the Toledo Republican mayoral convention found themselves deadlocked. When the smoke of compromise cleared, the politically unknown Jones, the successful business man, became the Republican nominee. Since he was a teetotaler with a church background, the Democrats attempted with some success to make temperance and a threat to the saloons a central issue. Jones observed sadly that despite the crucial issues of municipal ownership of public utilities, boss rule, the adoption of the eight-hour day and non-partisan elections, the only issue to surface was whether a few saloons were going to have their back doors open on Sundays.[15] The election was a squeaker and Jones won by the narrow margin of 518 votes. In his triumphant telegram to Henry Damerest Lloyd, Jones exclaimed, "I am elected in spite of 600 Saloons, the Traction Company, and the devil."[16]

In his two-year term as Mayor, Jones soon found that his golden rule plan for the city infuriated the party bosses and plutocrats when he refused to give the street railways and electric companies a bonanza of long-term franchises.[17] The preachers and moral reformers were shocked and incensed when he failed to close the saloons and run the prostitutes out of Toledo.[18] Then when he took away the clubs and revolvers from the police,[19] giving them light canes instead (said the canes were useful as pointers,)[20] sacred law and order seemed near death's door. It was a scandal to the good people when he presided as judge of the police court on Monday mornings and dismissed those who were arrested for vagrancy, drunkenness or prostitution with a sermon directed mainly at an economic and social system that had driven these basically fine people to such pitiful states.[21] Consistently in his speeches Jones quoted his Christian Socialist sister, Frances Willard, who blamed poverty as the prime cause for drinking and drunkenness.[22] If men were given jobs and proper cultural outlets Jones concluded, their desire for alcohol would soon vanish. "Overcome the evil of the saloon . . . with good, put something better in its place."[23] Prostitution he blamed largely on our vicious

double standard, and our failure to treat women as people. Men were more guilty than the women and were the primary cause yet they suffered no penalty.[24]

Brand Whitlock, a Jones disciple and his successor as mayor, recalled the delightful occasion when a committee of ladies and gentlemen demanded that the mayor put a stop to prostitution, to which Jones replied, "But what am I to do? These women are here."

"Have the police," they said, a new, simple and happy device suddenly occurring to them, "drive them out of town and close up the houses! They sat and looked at him, triumphantly.

"'But, where shall I have the police drive them? Over to Detroit or to Cleveland, or merely out into the country? They have to go somewhere, you know.'"

Then, wrote Whitlock, Jones turned to them and "with his infinite patience and sincerity," said, "I'll make you a proposition. You go and select two of the worst of these women you can find, and I'll agree to take them into my house and provide for them until they find some other home and some other way of making a living. And then you, each one of you, take one girl into your home, under the same conditions, and together we'll try to find homes for the rest."

"They looked at him," said Whitlock, "then looked at each other and seeing how utterly hopeless this strange man was, they went away."[25]

Two years later at the next election in 1899 the Republicans turned him down, refused to nominate him. Both Toledo newspapers ridiculed him; the Preachers even brought in another Sam Jones, the Evangelist from the South, to conduct a revival meeting and thus defeat Mayor Jones by blaming him for a wide-open town with "700 saloons . . . 400 bawdy houses . . . and 150 gambling dens that carry your young and old men down to hell."[26]

His Honor, the Mayor, a title Jones deeply despised, expressed his willingness to abide by the decision of the people in an open primary, but when the crooked Republican bosses rigged the convention to deny Jones the nomination, he ran as an independent--a political position he championed to the end. A wild campaign followed, but when the votes were counted, the Golden Rule crushed the opposition in a landslide with 70% of the vote. The people, said Jones, voted for "The Golden Rule" rather than "the rule of cash by a few people."[27]

The pure democratic philosophy of Golden Rule Jones, his literal acceptance of the Declaration of Independence, his worship of Walt Whitman, Bobby Burns, Henry Thoreau and Leo Tolstoy drove him to promote and champion the right of free speech. Shortly after he hung the Golden Rule on the wall of his plant, he purchased 150 "feet square" of land next to the factory, called it Golden Rule Park, and, on June 19, 1897, and every summer Sunday afternoon thereafter he invited speakers "to preach the gospel to the poor," and as Jones wrote a friend, "and to the rich too . . . if they happen to be within hearing." The list of speakers ran the gamut of the reformers and intellectuals of Protestants, Jews, Catholics, and agnostics.[28] As one newspaper reporter observed, the park was "the center of intelligence in Toledo."[29]

The typical Jones attitude toward free speech, discussion and debate appeared consistently in the Letters of Love and Labor he commenced on May 5, 1900 and inserted periodically in the pay envelops of his 100 or more employees. In one letter he reminded the men that Professor Charles Zueblin of the University of Chicago a leading Sociolist teacher, according to Jones, was to speak at Golden Rule Park on the following Sunday. "Come prepared to ply him with hard questions," Jones advised the men. "He is a college professor, and it is your business to show him how little he knows."[30]

Brand Whitlock, a young new lawyer in Toledo, soon found out how little he knew about the Golden Rule Mayor. From the "institutional voices" around him

he had heard nothing but derogatory remarks. "The most charitable thing they said about him," Whitlock observed, "was that he was crazy." Then one day the "big Welshman," as Whitlock described him, "with a sandy complexion and great hands" with "an eye that looked right into the center of your skull," wearing "a large cream-colored slouch hat, and . . . flowing cravat which for some inexplicable reason artists and social reformers wear" bounded into Whitlock's office, "wheeled a chair up to my desk and sat down." His invitation to Whitlock to speak at Golden Rule Park would startle the most radical rhetorician.

"On what subject?" Whitlock asked.

"There's only one subject," Jones said, "Life," and with that Whitlock noted, "his face was radiant with a really beautiful smile, warmed with his rich humor." Whitlock mumbled something about preparing, but the Mayor cut him off.

"Prepare! Why prepare? Just speak what's in your heart."[31] The Jones papers and the copious copies of his own prepared speeches belie this advice, yet he probably did speak extempore or even impromptu on most occasions.

Later during a campaign, perhaps when Jones ran in 1900 as the non-partisan candidate for governor and amazingly carried both Cleveland and Toledo,[32] he asked Whitlock on short notice to deliver a campaign speech. The young lawyer asked what kind of a crowd would be there. "Oh, a good crowd," the Mayor replied. "But what kind of people?" "What kind of people?" Jones asked. "Why, there's only one kind of people--just people, just folks."[33] And that was the highest compliment he could pay anyone. "I think that [the people] are always right," he wrote to a friend, "when they have an opportunity to express their honest convictions. I believe that the great mass of the people are right . . .; the majority of them are honest and their purposes are pure."[34]

Whitlock became a frequent speaker at Golden Rule Park and later at Golden Rule Hall, a large room Jones opened over the plant on Thanksgiving Day of 1898.[35] "There was never such a school for public speaking," Whitlock decided, "as that crowded park afforded, with street cars grinding and scraping by on one side and children laughing at their play on the swings and poles . . . or else standing below the speaker and looking curiously up into his face and filling him with the fear of treading any moment on their little fingers which, as they clung to the edge, made a border all along the front of the platform."[36]

Jones hoped his free speech, public discussion plan would spread throughout Toledo, suggesting that in no other way could "a comparatively small sum of money . . . do more toward building up good citizenship than by duplicating these meeting places on the hundreds of corners all over our large city."[37]

The concept of free expression did spread in Toledo, as revealed in a letter Jones wrote to a lady, seeking suitable employment for her husband. "There are two or three Golden Rule Clubs about the city and it is proposed to organize others. I should advise you to have your husband join one of them, where he will have an opportunity to compare his views with those of other men in debate. This will be not only a present benefit to him but may lead in time to opportunities for employment more in line with his views and doubtless also, his abilities."[38]

To Jones, free speech had to be free--literally. A person who charged a fee for the privilege of addressing the "people" violated the sacred concept of free speech. In the flood of invitations to speak that crossed his desk, his universal reply was, "I never sell talk, never accept a cent; the only cost will be the necessary travelling expenses."[39] Further, he objected strenously to any admission charge beyond covering actual expenses.[40]

The universal nature of free speech and the unlimited right of every person to dissent, protest, and criticize appeared repeatedly in his Letters of

Love and Labor. In his opening letter he admitted that his own opinion had changed over the years, and he would, therefore, "discuss" rather than "preach" in a dogmatic way. Defining a dogmatic person as one "who speaks . . . as though he had some authority that is not the common property of all the people, as though his word were final . . . . I emphatically disavow any sort of authority." Then, in what must have been a first of its kind, he invited his workers to criticize him and the company freely and thus placed suggestion boxes all over the shop. "Make any criticism that you desire of the shop management, or my personal life, and I hope you will be free to say how you think my life, or the life of the people in the Acme Sucker Rod Works, the city of Toledo, or the world, might be improved. You may feel perfectly free," he assured them, "to write anonymous contributions, though I think it better [to] sign your name. But," he admitted, "some of the best things in our literature are anonymous."[42] When they failed to respond, he chided them: "If you have a patent right scheme for saving the world, trot it out."[43]

His scheme included all races and particularly the other half of the race, at that time with only half a voice. "Women are people,"[44] he said repeatedly, and their problems and sufferings oppressed him. Said he, "I could wash my hands every day in women's tears."[45] And in letters and speeches he declared repeatedly "that the emancipation of women is a much more crying need even than the emancipation of men for woman is a slave of a slave."[46] He did not remove his hat in the presence of women--but only because he was ridiculed once for tipping his hat to a scrub woman at City Hall. "If I can't tip my hat to this lady who does the hard and dirty work of the world," he declared, "I will not take it off to anyone." And he didn't.[47] No orderly social or political system was possible, he claimed, until women were "in every respect the equal of man."[48] He deplored the fact that the "fashionable woods" were full of "women who pride themselves on their inequality,"[49] but he could see the day when women would "launch out equally with their fathers, brothers, and husbands to take their place in real, active, stormy life."[50]

Our support of so-called first-amendment rights, many based on unproved--perhaps unprovable assumptions and premises were accepted and practiced with complete faith and promoted with a bouyant, optimistic world view that could see the millennium just around the corner. Democracy to him was synonymous with Christianity. Like many of his Christian socialist brethren he probably underestimated the power and resilience of human greed and sin. Given the right environment and system, Jones believed, all persons--basically good--would grant all other persons the same rights and freedoms they wanted for themselves. "Democracy has not failed," Jones consistently proclaimed. "Like Christianity, it has not yet been tried. Thus far we have only dimly understood the meaning of either word."[51] After meeting this remarkable man and observing his bizarre behavior, Lincoln Steffens in a state of disbelief declared, "Why, that man's program will take a thousand years to accomplish . . . . Yes--or a hundred thousand. But there is no other way."[52]

Endnotes

[1]Jones related his early history in his book, The New Right (New York: Eastern Book Concern, 1899), pp. 40-60.

[2]Brand Whitlock, Forty Years of It (New York: D. Appleton and Co., 1914), p. 113.

[3]Samuel Milton Jones Papers, Toledo-Lucas County Public Library, Toledo, Ohio (Samuel Milton Jones microfilm edition, roll 11). Hereafter cited as Jones Papers.

[4]Jones, New Right, p. 62.

[5]Jones to N. O. Nelson, July 13, 1898. Jones Papers, roll 2.

[6]Jones, "The Golden Rule in Real Life," circa 1899. Jones Papers, roll 12.

[7]George D. Herron, "The Message of Jesus to Men of Wealth," in Ernest J. Wrage and Barnet Baskerville ed., American Forum: Speeches on Historic Issues, 1788-1900 (New York: Harper and Row, 1960), pp. 281-282.

[8]Jones, New Right, p. 401; Jones, "Golden Rule," Jones Papers, roll 12.

[9]Jones, New Right, pp. 60-65; James H. Rodabaugh, "Samuel M. Jones: Evangel of Equality," The Historical Society of Northwestern Ohio Quarterly Bulletin 15(January 1943): 24, 28; Samuel M. Jones, Letters of Labor and Love, Reprint, 2 vols in 1 (Indianapolis: Bobbs-Merrill Co., 1905), pp. 40, 104, 173-75; Jones, "Concerning the Finances of the Golden Rule Dining Hall," April 25, 1902, Jones Papers, roll 12.

[10]John Chamberlain, Farewell to Reform (New York: Liveright, 1932), p. 57.

[11]Jones, New Right, p. 66.

[12]Ibid., p. 404.

[13]Ibid., p. 66

[14]Ibid., p. 79.

[15]Jones, "Address Before Republican Gathering Concerning the Mayoral Campaign 1897," Circa February-April 4, 1897; "National and Municipal Politics, an Address Before the 14th Ward Jackson League Club," March 23, 1897, Jones Papers, roll 12.

[16]Jones to Henry D. Lloyd, April 6, 1897, Jones Papers, roll 1.

[17]Jones, "Municipal Ownership: an Address Before the League of American Municipalities," August 3, 1898. Jones Papers, roll 12.

[18]William G. McLoughlin, "Jones vs Jones," American Heritage, 12 (April 1961): 56.

[19]Frederic C. Howe, The Confessions of a Reformer (New York: Charles Scribners Sons, 1925), p. 188. Whitlock, Forty Years, p. 258.

[20]Jones, "Address of Welcome to the 7th annual Ohio State Conference of Charities and Correction," October 26, 1897, Jones Papers, roll 12.

[21]Howe, Confessions, p. 185.

[22]Jones, New Right, p. 159.

[23]Jones to George M. Gray, May 10, 1899, Jones Papers, roll 3.

[24]Jones, "Prostitution," September 8, 1898, Jones Papers, roll 12: Howe, Confessions, p. 185.

[25]Whitlock, Forty Years, p. 268-270.

[26]McLoughlin, "Jones vs Jones," p. 87.

[27]Ibid., p. 89. In a typical letter, he wrote, "Drop the Hon. please. I claim that sort of title does not belong to a democracy. It is the fag end of the aristocracy . . . " Jones to J. C. McKinney, April 2, 1902, Jones Papers, roll 7.

[28]Jones, "Acme Sucker Rod Company," January 1899, Jones Papers, roll 12; Jones to J. H. Kellog, August 5, 1898, Jones Papers, roll 2; Jones, "Golden Rule Park Address," circa September-October, 1897, Jones Papers, roll 12.

[29]Whitlock, Forty Years, p. 115.

[30]Jones, Letters, p. 54-55.

[31]Whitlock, Forty Years, p. 115-116.

[32]Rodabaugh, "Evangel," p. 38.

[33]Whitlock, Forty Years, p. 116.

[34]Jones to Cone, April 28, 1897, Jones Papers, roll 1.

[35]Jones, "Acme Sucker Rod Company: The Economic and Social Conditions which Influence Its Business Philosophy," circa, January 1899, Jones Papers, roll 12.

[36]Whitlock, Forty Years, pp. 116-117.

[37]Jones, "Golden Rule Park Address," circa September-October, 1897, Jones Papers, roll 12.

[38]Jones to Estell Johnson, July 20, 1899, Jones Papers, roll 7.

[39]A reply typical of Jones was to George Bicknell of Sullivan, Indiana, April 6, 1903, Jones Papers, roll 7.

[40]To L. B. Neller on April 10, 1903 Jones wrote, "I should want to know what your program included, and do not make a practice of speaking when admission is charged." Jones Papers, roll 7.

[41]Jones, Letters, Introduction by Brad Whitlock. "Any one [letter], according to Whitlock, "might fairly represent any political speech [Jones] ever made." A random glance at his manuscript speeches would confirm this view.

[42]Ibid., pp. 28-30.

[43]Ibid., pp. 54; 101.

[44]"Mayor Jones' Speech" (At Invitation of Organized Labor), July 1, 1899, Jones Papers, roll 12.

[45]Whitlock, Forty Years, p. 218.

[46]Jones to Mrs. James Thompson, May 10, 1899, Jones Papers, roll 3. See also, Jones, "What Can a Woman Do Toward Good City Government?" Jones Papers, roll 12.

[47]Howe, Confessions, p. 186-87. Mamie M. Hanner, a saloonkeeper's wife, wrote an indignant letter to Jones, scolding him for only nodding his head "without raising your cap" when she had bowed to Jones in a street car. In a well-written four-page letter she castigated him, reminding the mayor "not [to] think for one minute because it is my misfortune to have my husband in the saloon business [sic] you can wound my feelings without my resenting it." Hanner to Jones, November 30, 1902, Jones Papers, roll 11. On December 2 she wrote a second letter, apparently in response to one from Jones, fully accepting his explanation or apology.

[48]Jones, Letters, p. 43.

[49]Jones, "What Can a Woman Do Toward Good City Government?" Jones Papers, roll 12.

[50]Jones, Letters, p. 49.

[51]Jones, New Right, p. 322.

[52]Whitlock, Forty Years, p. 164; 205.

ACCESS RIGHTS TO THE MASS MEDIA: THE HIDDEN CHANNELS

Dean Silvers
State University of New York at Buffalo

The Access Doctrine

The history of the First Amendment of the United States Constitution has shown it to be the guardian of the printed word. But today, in our "media environment," the First Amendment assumes the added burden of protecting rights which involve the broadcast word and all the complexities it entails.

To have a First Amendment right to speak without having a potential audience renders such a right meaningless. Thus the interest in the First Amendment in society has shifted from asking "what" is being said, to now asking, "where" is it being said? Can anybody hear the speaker? Is he/she getting a fair chance to bring out his/her point?

Although recent case developments have seen the strengthening of the Free Press Clause of the First Amendment,[1] the individual's right to free speech and expression has become weakened.[2] This factor becomes all the more important when one realizes that other traditional means of securing an effective right to speak and express oneself have been cut back by the Supreme Court.[3]

The importance of these occurrences cannot be underestimated in regard to the vitality they have taken away from the individual's First Amendment right. Scholars, journalists, and civil libertarians have written extensively on the symbiotic relationship of the First Amendment and the mass media, but few have taken any meaningful steps towards structuring a system of rights which would combat the diminishing capacity of the individual truly to secure a right to free expression and speech. This article takes the initial step towards creating a strengthened right to free speech and expression through the concept of the individual's right of access to the media on the state and local level.

A major part of the access problem is the inability to define what exactly access is. Nevertheless, a general outline of what access has meant, or could mean in mass media law can be seen in Benno Schmidt's Freedom of the Press vs. Public Access:

1. The right of the representative of some group or cause to present the viewpoint of that group or cause in a particular publication or medium in response to an earlier opposition statement.

2. The rights of a person who has been attacked as to honesty or integrity, criticized, put in a false light (though not necessarily adverse), or mentioned in any fashion, to have published in the same medium a reply of his own composition.

3. The right to advertise in any medium that exercises monopoly power over effective communication of the subject matter of that advertisement on a given market.

4. The right to advertise on a first-come, first-served basis in any medium that accepts advertisements of any kind.

5. The right of anyone to have views published at no cost concerning any matter, or any matter determined to be of substantial public

> importance as ruled by a court or public official; or any matter on which the medium sought has editorialized, covered as news, or published an advertisement about; or any matter of substantial public importance on which the medium has editorialized, covered as news, or advertised.[4]

When legally analyzing access rights, there exist legitimate rights on both sides of the issue (a broadcaster's autonomy vs. an individual's right of free expression on a public franchise). Thus the government makes choices as to how competing claims of the owners, speakers, listeners, and others are to be resolved.

In access to the media cases a particular question must be asked:

> [I]n light of the degree to which the exchange of ideas or information is in fact inhibited by a particular allocation of exclusionary power under state law, and in light of the burdens on private individuals that would be entailed by a less inhibiting allocation (a less restrictive alternative), can first amendment principles tolerate the allocation that the state has chosen to enforce?[5]

Generally speaking, the access doctrine gained notoriety and began to be taken seriously due to the writings of Professor Jerome Barron.[6] However, Barron's justification of access was subsequently rejected by the Supreme Court in Miami Herald Publishing Company vs Tornillo.[7] Consequently, many scholars said that Barron had "said it all" in regard to access, and the Supreme Court's rejection of Barron's ideas sounded the death knell for the access doctrine. Yet nothing could be further from the truth. Perhaps Barron's form of justification for access has been rejected, but in recent years many alternative theories for access have been formulated, thus keeping the access concept quite alive. An example of the five major access theories today can be seen in the following section.

Five Significant Access Theories in Society

1) The Federal Communications Theory of Access:

According to the Communications Act of 1934, no one may broadcast without a license, and the government gives out licenses free of charge to those it believes will best serve the public interest. The initial Federal Communications Commission rationale behind this means of regulation was the scarcity theory. The scarcity theory rests upon the notion that the scarcity of the electromagnetic spectrum in relation to demand for its use justifies F.C.C. regulation in the name of the public interest.

Historically, inexpensive receiving sets became available in the early 1920's, and private use of the electromagnetic spectrum grew enormously in those years.[8] The Secretary of Commerce made efforts to enforce prior legislation (Communication Act of 1912) by encouraging self-regulation by the industry to reduce signal interference. Such efforts proved fruitless (perhaps similar to the call for self-restraint in these inflationary times), and mass confusion reigned supreme in the electromagnetic spectrum, a bit similar to the problems the F.C.C. recently had until it set down more explicit rules in regard to citizens band radio. Thus Congress responded with the Radio Act of 1927, followed seven years later by the Communications Act of 1934, in which explicit rules and regulations of the electromagnetic spectrum were set out.

In 1943, the Supreme Court, in N.B.C. vs. the U.S., 319 U.S. 190 (1943), affirmed these acts and the scarcity doctrine by stating, "[u]nlike other modes

of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation."[9]

The F.C.C.'s policy regarding access crystallized in the Fairness Doctrine. The Fairness Doctrine basically states that broadcasters are obliged to cover controversial issues of public importance and to broadcast opposing points of view on those issues.[10] The Fairness Doctrine, which is not in any of the Communication Acts, was first used in 1929 when the Federal Radio Commission revoked a broadcaster's license because he broadcast only one point of view. The Court ruled that the spectrum should not be used to allow one "school of thought, religious, political, social, and economic, to the exclusion of others,"[11] for it is not in the public interest. The Fairness Doctrine was

> continued and obscured by the FCC through the 30's and early 40's with the result that broadcasters totally abandoned the practice of editorializing and dropped much programming that might have been thought controversial. Unhappy with this development, the F.C.C. conducted an inquiry during 1947-49 and finally ordained in a 1949 report that every licensee must devote a reasonable portion of the broadcast time to the discussion of of controversial issues and had a responsibility for the presentation of all sides of such issues.[12]

And eventually Red Lion Broadcasting Co. vs. F.C.C., 395 U.S. 367(1969) brought about the "judicialization" of the Fairness Doctrine. In a case dealing with a preacher on the radio attacking the honesty and integrity of an author and subsequent refusal of the station to give reply time without payment, the Supreme Court not only reaffirmed the Fairness Doctrine, but unanimously overrules the absolue autonomy of broadcasters in the name of the right of the viewers and diversity.[13] The oft quoted statement reads

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by Government itself or a private license.[14]

In Columbia Broadcasting System vs Democratic National Committee, 412 U.S. 94 (1973), the Court retreated somewhat in ruling that a broadcast station does not have to open its facilities on demand. Yet this decision does not go directly against the grain of the Fairness Doctrine. And in the subsequent years, numerous cases have delineated the continued vitality of the Fairness Doctrine.[15]

2) The Access-For-Ideas Theory:

The major force behind the access-for-ideas theory is Professor Jerome Barron. Professor Barron not only argued that access laws ought to be upheld but also that access should be a general First Amendment right, that the government should affirmatively seek to enforce the citizen's access rights to the media. This theory was based primarily on the scarcity theory and fear of media concentration. Barron argues,

> There is an anomaly in our Constitutional law. While we protect expression once it has come to the fore, our law is indifferent to creating opportunities for expression. Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the "marketplace of ideas" is freely accessible. But if ever there were a self-operating marketplace of ideas,

> it has long ceased to exist. The mass media's development of an antipathy to ideas requires legal intervention if novel and unpopular ideas are to be assured a forum.[17]

The Red Lion case, in asserting the priority of the viewer's First Amendment right over the broadcaster's, represented a solid victory for Barron's access-for-ideas theory. Five years later however, Miami Herald Publishing Company vs Tornillo, 418 U.S. 312 (1974), in which the Supreme Court ruled unconstitutional a Florida right-to-access statute for newspapers, constituted a firm rejection of the Barron thesis. Here the Court ruled that autonomy of the press (to function as "editors') is also a guarantee of consitutional value. Barron's affirmative access-for-ideas doctrine that he attempted to extend into Tornillo (Barron was Tornillo's counsel before the Supreme Court) was firmly rejected.

In general, with the scarcity doctrine diminishing in stature as a grounds for access rationale,[18] a resurrection of sorts has been made for the access-for-ideas concept by Professor Roscoe Barrow, in the name of the public's "right to know."[19] Barrow's theory emanates from a cable television system,[20] but it is an important enough theory to be extended as a social theory for media per se. He argues that if citizens do not participate in society, the line between democratic and authoritarian government will grow obscure. Barrow argues that scarcity alone does not explain the outcome of NBC and Red Lion. The major concept developed in those cases was that of a Broadcasting Station acting as a Public Franchise, combating the general fear of broadcaster control of public opinion and political processes. Thus the use of the public domain requires an accomodation of the First Amendment rights of the viewers. Such a theory attempts to resurrect access-for-ideas by stressing and expanding Barron's section that has not fallen into disrepute (public domain, marketplace for ideas), while ignoring the generally less favored section (the scarcity theory).[21]

A more extremist offshoot of the access-for-ideas theory can be seen in the writings of Herbert Schiller.[22] Professor Schiller asserts that we need access-for-ideas not because of the public's right to know, but rather, we must have access to combat the forces of big business from totally dominating our liberties in the name of commercialism. He states:

> The cultural conglomerate that presides over information and general message creation cannot be regarded, as they are in the United States, as individuals--persons protected by constitutuional guarantees of freedom of speech and expression. RCA, General Electric, CBS, and the Reader's Digest, for example, are not single individuals whose personal rights are inviolable. They are, first and foremost, private, profit-making corporations whose outputs are processed entirely according to commercial specifications. Certainly, individual efforts are incorporated into cultural commodities; but the final product is a corporate package containing corporate ideological concepts.[23]

Schiller cites a recent study by a Congressional committee on Disclosure of Corporate Ownership, which revealed that a few powerful banks exercised substantial voting rights in American television network and broadcast companies.

> Chase Manhattan has sole or partial voting rights to more than 14 percent of the stock in the Columbia Broadcasting System, as well as 4.5 percent of the stock in RCA corporation, parent of the National Broadcasting Company; Banker's Trust has voting rights to more than 10 percent of the stock

> in American Broadcasting Company and 9.8 percent of the stock in Metromedia; First National City Bank (of New York) has voting rights to 7.1 percent of the stock in Capital Cities Broadcasting Corporation, which includes six TV and eleven radio stations; eleven banks have voting rights to 34.1 percent of the common stock in ABC.[24]

Schiller concludes that such huge image-making and image-disseminating superstructures, under banking and industrial capital domination, cannot possibly be regarded as individuals with inalienable rights. When they are regarded as such, they are allowed to contiue to exploit and dominate any true individual rights and expression against the corporate dominative structures of mass media in our society (note: he refers mainly to the networks, their stations, and the power they have over their affiliate stations throughout the country).

3) Access: A Theory of Partial Regulation of the Mass Media:

The leading exponent of the partial regulation theory is Professor Lee Bollinger.[25] Bollinger disregards the scarcity rationale as a threshold question for government regulation. He feels that television's high level of concentration and its purported effect on its viewers do not justify the different treatment under the First Amendment that the print media gets; there is a difference only because we assume a difference.[26] Unlike many other access theoreticians, Bollinger is more interested in the relationship of access between different types of media (i.e., print media vs. broadcast media) rather than access as an independent concept. His analysis assumes a more psychological-socialization basis, asserting that many of the differences we attribute to broadcasting were originally formulated when media technology was new and generally feared by the populace at large. This lack of knowledge resulted in government regulation. He continues by stating that we take a very narrow view when we discuss First Amendment access questions. We always talk in terms of total access or no access at all in any of the media. Instead, we should formulate a system of partial regulation, regulating the electronic media exclusively and continuing to allow the print media to be free from government regulation.[27] He writes:

> The most obvious First Amendment advantage to a partial system of regulation is that the unregulated sector provides a significant measure of protection against errors--both purposeful and inadvertent--arising from the regulatory enterprise. Abuses can be contained. But there is more than that. The cost of regulation may be reduced, as, for example, by the unregulated media providing a competitive incentive to the regulated outlets to publish materials which the latter might otherwise choose to suppress for fear of government reprisal. But above all a partial system preserves our First Amendment tradition of an autonomous press and makes the reform an exception to that tradition. The psychological importance of that fact, for both the perceptions of the public in general and the regulators more specifically, can be enormous. In effect, it indicates to all that we are not embarking on a wholesale revision of values which have so long formed the basis of our thinking about the press.[28]

Bollinger also stresses, in regard to combating the scarcity-media concentration argument, that quality, not quantity must be stressed when discussing access concepts. He feels that such a fact is specifically consistent with First Amendment objectives. Thus by associating this notion with his partial regulation system, he counteracts the "chilling effect to the medium" argument, that was stressed in the Tornillo case as a major reason for overruling the statutory access requirements.

4) Economics, Free Competition, and Access Regulation:

Bollinger's partial theory of regulation deals primarily with the idea that there is no rational reason to differentiate between regulation in print and broadcast media. Such an idea was also presented by economists who base their arguments on an economic analysis of the First Amendment in a capitalist society. A primary exponent of such a theory is Professor R. H. Coase.[29]

Coase notes that society feels that it is desirable to have the government regulate the ordinary market for goods and services but that it is considered undesirable for the government to regulate the "market of ideas" (e.g., free speech). According to Coase such a distinction is unjustifiable; the view that a free market of ideas is necessary to the maintenance of democratic institutions, which is a major rationale for the distinction, is unwarrantable.[30] In the belief that such an exaltation of the marketplace of ideas is indefensible he writes:

> The bulk of mankind will for the forseeable future have to devote a considerable fraction of their active lives to economic activity. For these people, freedom of choice as owners of resources in choosing within available and continually changing opportunities, areas of employment, investment, and consumption is fully as important as freedom of discussion and participation in government.[31]

Professor Coase sees the difference in view of the role of government regulation in these two markets to be an extraordinary paradox. This outlook is particularly true when one realizes that it is usually those who urge most vociferously for an extension of government regulation in other markets who are most anxious for a vigorous enforcement of the First Amendment prohibitions on government regulation in the market of ideas.[32]

The real explanation for the distinction that the market of ideas has pre-eminence is explainable to Case in terms of self-interest and self-esteem:

> The market for ideas is the market in which the intellectual conducts his trade . . . . Self-esteem leads the intellectuals to magnify the importance of their own market. That others should be regulated seems natural, particularly as many of the intellectuals see themselves as doing the regulating. But self-interest combines with self-esteem to ensure that, while others are regulated, regulation should not apply to them. And so it is possible to live with these contradictory views about the role of the government in these two markets.[33]

Coase then extends his argument (in other works) to assert that the ideal situation would be to decrease government regulation in the market of goods. Along similar lines, the goal of the First Amendment could then be equated with the deregulation of the market of goods. Then, if the goal of the First Amendment is really to prevent government intrusion in the media, and if one can extend this concept to allow the government structurally to intervene in the name of reducing private restraints on the competitive flow of information, a new set of options become available.[34] In such a system Coase would initially require that radio spectrum allocation is auctioned off, that it no longer is to be leased.[35] The whole system would then become privately owned, not privately controlled as it is today. To Coase, regulation is not and cannot be a substitute for competition in a free marketplace. Thus access rights under such a system would be relegated to a position of whether or not the individual owner of the broadcast station would want to give out station time, without the compunction of any government regulation.

5) The "Checking Value" and Access Regulation:

Vincent Blasi has claimed that the First Amendment must function as a "checking value," in checking the abuse of official power in this country.[36] Blasi writes that free expression has value in part because of the role it has in checking abusive government action. This function, and the significance of such a First Amendment function has been underestimated in our judicial history.

Under the checking value each citizen must initially determine when the controversial acts of government officials are violative enough to be considered acts of misconduct.[37] Then the citizen's First Amendment right for active opposition becomes a civic duty.[38] In his work, Blasi examines the three major theories of First Amendment adjudication: self-autonomy, diversity, and self-government (the Meikeljohn theory). He then argues that although all three have served First Amendment rights in our past, they have done so only partially. The checking value is an ideal supplement for these three theories. It is also ideal in itself as a motivating factor in First Amendment adjudication.

The checking value derives from a system of consequentialist ethics, giving First Amendment protection only if the probably good social consequences outweigh the bad. Thus unsympathetic application is taken into consideration by realizing the occasional need for an unqualified prophylactic standard.[39]

In regard to access, Professor Blasi declares that the checking value has always been covertly used as a rationale in access adjudication, but such an analysis, being unrecognized, has been used sporadically and in an inconsistent manner. The Supreme Court's deficiency in judicial craftsmanship in access cases is due to its unawareness of the inexplicit impact the checking value has had on their thinking and judgements.[40] Examples of such ambiguity can be seen in

> the Chief Justice's failure in the Democratic National Committee and Tornillo to develop a rationale for the concept of journalistic discretion; his failure, and that of Justice White, to explain why journalistic discretion was never mentioned in Red Lion; the failure of all the Justices in Tornillo even to mention the Red Lion precedent or to defend the distinction between access regulations imposed on broadcast licenses and those imposed on the print media; the failure of all the opinions in Democratic National Committee except Justice Brennan's to discuss in any detail the First Amendment values implicated in the right-of-access claim; the dramatic shift of emphasis by all Justices after the Red Lion decision away from the characterization of broadcast licensees as "proxies" or "fiduciaries" for the general public; Justice Stewart's strained effort in Democratic National Committee to explain away his vote four years earlier in Red Lion.[41]

Blasi argues that if the Justices were aware of their subconscious consideration of the checking value their subsequent opinions would follow a more consistent and coherent pattern.[42]

Additionally, Blasi like Bollinger, stresses the psychological importance the checking value has, for

> . . .the checking value provides a justification for journalistic autonomy at the all-important level of symbolism. Many persons who react intuitively against a right of access are influenced by the specter of a government-controlled press, one of the hallmarks of the totalitarian state. The checking value likewise is based in considerable part on the fear

> of totalitarianism. In this respect, a proponent of the checking value is likely to believe that even regulations with limited material impact are objectionable if they tarnish any of the symbols that distinguish democratic forms of government from their totalitarian counterparts.[43]

In this vein Blasi writes that the checking value would determine that the Fairness Doctrine would be violative of the First Amendment. By imposing an external standard on the overall performance of a station, its future ability to check government abuse is curtailed and its journalistic autonomy undercut. Additionally, the ambiguity of the fairness standard combined with the severity of the sanction (revocation of broadcast license)[44] would definitely inhibit a broadcaster from possibly checking government abuses in the future.[45]

Concerns about administrative difficulties and having no guiding principle in regard to determining how much access should be given leads Blasi to conclude that a free-access requirement should not be considered to flow from the First Amendment standing alone without regard to statute or administrative regulation.[46] The threshold question to be asked under this theory would be, would the specific right generate communications that are likely to serve the checking value?[47] If so, then they should be given priority.

The Future: Access and Cable Television On the State and Local Level of Regulation

Practically speaking, it appears that in recent years access rights has been cut back by the Supreme Court.[48] I assert that such a process is inevitable, with my major claim being that access to the media can only work in cable television; for any attempt to gain individual access in mainstream broadcasting will ultimately lead to failure.

In mainstream television it would be extremely hard to create access on any other than a special interest basis without restructuring society in general. The structure of mainstream television is so entrenched in our society that any major shifts would be highly unlikely.

On the other hand, cable television, the process of transmission by coaxial cable rather than by the electromagnetic spectrum as is the case in mainstream broadcasting, is a relatively new medium in society,[49] and is ready and suited to deal with access to this medium. Being a relatively new medium, cable can be changed and molded without calling for drastic measures. Furthermore, on an administrative level cable operates differently than mainstream broadcasting. Cable franchises are granted by the local franchising authorities. Any subsequent restrictions should flow from the source of the privilege, i.e., the franchising authorities, as a matter of course, but such is not the case. Cable is today regulated primarily by the F.C.C., on the Federal level. By having a bifurcated system whereby the F.C.C. at the Federal level authorized cable regulations at the local level, an artificial relationship is thereby created. By dealing with cable and access rights on the state and local level, this problem is mollified.

Access rights to be equitable must be adjudicated and legislated on the state and local level. For an F.C.C. official in Washington D.C. to tell an individual in Osh-Kosh, Wisconsin, what rights he/she has in dealing with his/her local broadcasting station is, as has indeed been proved, an ineffective and inequitable means of regulation.[50]

In addition, the F.C.C. has made it clear in the past few years that decentralization of its operations is one of its major goals. The media is too immense an industry to be regulated soley within the Commission's auspices. In this vein, "reregulation" of cable television on the state and local level in the future should receive the blessings of the F.C.C.

On the judicial level, recent decisions by the Supreme Court have been in the direction of decentralization by shifting the emphasis from the Federal to the state and local level in dealing with mass media law.[51] Furthermore, Supreme Court Justice William Brennan in his recent article has specifically called for an increase in state judicial activism, particularly when dealing with the protection of individual rights in matters previously adjudicated primarily within the Supreme Court.[52] And the majority of the Court in its most recent access case spoke in strong terms of structuring access rights on the state level of government.[53] It becomes evident that all roads lead to cable and access regulation on the state and local level, but few have gone down this road, and none have studied the ramifications of such a course of action.[54]

This article takes the first step toward proposing an effective right of free speech and expression vis-a-vis access to cable television effectuated on the state and local level of government. It is not offered as a solution but rather as an invitation to others to initiate legislation on this level and in this critical arena.

Endnotes

[1]Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978), and Miami Herald Publishing Company v. Tornillo, 418 U.S. 539 (1974).

[2]F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978), and Gannett v. DePasquale, 443 U.S. 368 (1979).

[3]Hudgens v. National Labor Relations Board, 424 U.S. 507 (1976).

[4]Freedom of the Press vs. Public Access (New York: Praeger Publishers, 1976), p. 16.

[5]Laurence Tribe, American Constitutional Law (New York: Foundation Press, 1978), p. 695.

[6]Freedom of the Press for Whom? (1973); "Access to the Press- A First Amendment Right," 80 Harv. L. Rev. 1641 (1967); "An Emerging First Amendment Right of Access to the Media?", 37 Geo. Wash. L. Rev. 487 (1969).

[7]418 U.S. 539 (1974).

[8]William Baxter, "Regulation and Diversity in Communications Media", American Economic Association, May 1974, p.392.

[9]p.213.

[10]For example, F.C.C. Report, Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949) and Cullman Broadcasting Company, 40 F.C.C. 576 (1963).

[11]Great Lakes Broadcasting Company, 3 F.R.C. Ann. Rep. 32 (1929).

[12]Baxter, p. 392.

[13]Justice Douglas did not participate.

[14]Pp. 388-390.

[15]For examples of the continued vitality of the Fairness Doctrine, see Steven Simmons, The Fairness Doctrine and the Media (California: University of California Press, 1978), particularly pp. 10-12.

[16]Barron (see footnote #6 above).

[17]"Access to the Press- A New First Amendment Right," 80 Harv. L. Rev. 1641 (1967).

[18]Schmidt, part III.

[19]"Program Regulation in Cable Television: Fostering Debate In A Cohesive Audience", 61 Va. L. Rev. 515 (1975).

[20]Cable Television possesses some unique characteristics, which at times makes comparison of it with mainstream television difficult. Some of these problems will be discussed later in the article.

[21]Some critics assert that Tornillo knocks down Barron's theory. However, Tornillo stressed the fact that the case dealt with a newspaper, and was more along scarcity doctrine lines. A fuller discussion of Tornillo will be found later in this paper.

[22]Communication and the American Empire (Massachusetts: Beacon Press, 1969); Communication and Cultural Domination, (New York, 1976).

[23]Ibid., p. 104.

[24]Ibid., pp. 104-105.

[25]"Freedom of the Press and Public Access, Toward a Theory of Partial Regulation of the Mass Media", 75 Mich. L. Rev. 1 (1977).

[26]Ibid.

[27]Lee Bollinger, Book Review of Freedom of the Press vs. Public Access, 76 Columbia L. Rev. 1354 (1976).

[28]Ibid., pp. 1365-1366.

[29]"The Market for Goods and the Market for Ideas", American Economic Association, May 1974.

[30]Ibid., p. 385.

[31]Ibid

[32]Ibid., p. 386.

[33]Ibid.

[34]Bruce Owen, "First Amendment -- Discussion", American Economic Association, May 1974, p.401.

[35]Ibid.

[36]"The Checking Value in First Amendment Theory", American Bar Foundation Research Journal, Summer 1977, #3.

[37]Professor Blasi defines misconduct as transcending the bounds of decency.

[38]Blasi, p. 543.

[39]Ibid., p. 559.

[40]Ibid., p. 623.

[41]Ibid.

[42]Ibid.

[43]Ibid., p.625.

[44]Recently the F.C.C. has imposed less severe sanctions (e.g., fines), but license revocation still serves as a strong inhibiting factor.

[45]Blasi, p.627.

[46]Ibid., p.630.

[47]Ibid., p.638.

[48]C.B.S. v. National Democratic Committee, 412 U.S. 94 (1973); Miami Herald v. Tornillo, 418 U.S. 241 (1974); F.C.C. v. Midwest Video Corp., 440 U.S. 689 (1979).

[49]U.S. v. Southwestern Cable Co., 392 U.S. 157 (1978).

[50]This ineffectiveness can be seen in the vast complexity of Section 76 of the F.C.C. Rules, the cable regulation section.

[51]Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[52]William Brennan Jr., "State Constitutions and the Protection of Individuals Rights", 90 Harv. L. Rev. 3 (1977).

[53]F.C.C. v. Midwest Video Corp., 990 S.Ct. 1435, 1446 (1979).

[54]California's State legislation, AB699, passed in October 1979, is the only state bill passed that deals with access and cable television.

THE EFFECTS OF CENSORSHIP ON THE VALUATION OF SEXUALLY EXPLICIT MESSAGES

David D. Hudson
University of Hawaii at Manoa

> It can easily be shown that the psychical value of erotic (sexual) needs is reduced as their satisfaction becomes easy. An obstacle is required in order to heighten libido; and where natural resistances to satisfaction have not been sufficient men have at all times erected conventional ones so as to be able to enjoy love. This is true of both individuals and of nations.
>
> -Sigmund Freud, "On the Universal Tendency to Debasement in the Sphere of Love," 1912.

Human communication scholars traditionally have concerned themselves with understanding how various communicators and communications will affect an individual's attitudes. Theory and research in this area generally have dealt with studying the effects that exposure to certain messages might have on individuals. One of the questions that has been asked is whether or not access to certain types of information will have any adverse effects on the audience's attitudes or behavior. The present study suggests that another related and equally important question needs to be examined: that is, what might be the attitudinal effects of restricting the availability of a message an individual is interested in obtaining.

The issues related to message restriction historically have been the concern of First Amendment scholars interested in the moral and legal consequences of message censorship. John Milton's speech in defense of a free press, the "Areopagitica," and John Stuart Mill's essay, "On Liberty," have both played a central role in the shaping of the meaning of freedom of speech and press in the United States. There has been, however, a lack of study in the "attitudinal" effects that the restriction of messages might have on individuals. The uproar over the Watergate cover-up and over the censorship of the Pentagon Papers highlight the importance of investigating the effects which delaying or restricting messages might have on their intended receiver.[1] These events also highlight the lack of understanding of the effects of message restriction. It is toward this issue that the present study was directed.

Commodity Theory

The principle set of concerns from which this study was generated stems from a consideration of commodity theory developed by Brock.[2] The theory, which is an attempt to apply psychological variables to the consumption process, focuses on the effects of objects, experiences, and communications that are selectively distributed or enjoyed. A commodity, according to Brock, is defined as anything that (a) has some usefulness to the potential possessor and (b) can be conveyed from person to person. Therefore, symbolic stimuli--spoken and written messages--may be considered commodities. A major premise of the theory is that "any commodity will be valued to the extent that it is unavailable."[3] The unavailability of a commodity refers primarily to situational variations that are likely to induce perceptions of scarcity (who is giving the message and who will get it), effort to withhold and obtain (effort by the communicator and by the recipient), and situational constraints (prohibitions restricting and delaying transmittal). Brock coined the term "commodification" to refer to these situational variations. The value of a commodity such as a message is defined as its "effectiveness or potency for affecting attitudes and behavior."[4] Specifically, value refers to the desirability or attractiveness of the commodity in question. In brief, the basis of the theory is that "any commodity that is perceived as unavailable, that cannot be otained, or

that can be obtained only with effort will be valued more than something that can be freely obtained."[5]

It is clear that commodity theory may have some explanatory power over a number of events and phenomena. One possible area of application involves the pornography-control issue.[6] In the past, important questions have been raised concerning the potentially harmful or adverse effects that pornographic messages may have on the user (a child or adult), as well as the effects such messages may have on public morality or taste. Legal debates have arisen with regard to legislation to regulate the flow of such messages without interfering with fundamental constitutional liberties. However, a neglected issue that is of equal importance is the effect that restricted or delayed messages might have on the intended recipient.[7] This study was an attempt to explore some of the potential attitudinal consequences of such constraint.

One possible outcome of research in this particular application of commodity theory lies in the dilemma it poses for future legislative action. In the past, restrictions on pornography usually have been applied under the assumption that if the individual is not exposed to a particular message then he or she will not be converted to belief in whatever the communicator was advocating.[8] Supreme Court rulings with regard to obscenity historically have assumed that restrictions on pornography will decrease its availability and, thus, reduce any effect pornography might have on deviant or criminal behavior.[9] Commodity theory, however, suggests that efforts to restrict or censor sexually explicit messages may have the unexpected effect of increasing interest in the materials, making them more desirable, and having a greater effect on individuals, then if they were readily accessible.[10] Thus, this study predicted that a sexually explicit film that has been censored will be valued more than a sexually explicit film that is readily available.

Tests of commodity theory also may provide generalizable information about certain communication outcomes. Obviously, research in this area could contribute to the theory building process by delineating situational factors such as "scarcity," "effort," "restriction," and "delay" that might influence communication satisfaction and message preference. For example, limited distribution of messages, withholding of information, and restrictions placed on message transmittal, may actuate intrapersonal processes that determine the acceptance or rejection of potentially persuasive communications in political, organizational and interpersonal settings. It is conceivable that the selective communication of messages in these instances may be understandable in terms of the same theoretical framework applied in this study to the pornography-control issue.

METHOD

Subject Selection

All students enrolled in introductory speech communication courses at the University of Denver during Winter Quarter, 1979, were asked to respond to a five-point item which states, "It is important for me to have information about sex." The end points on the scale were bounded with the phrases "Disagree strongly" and "Agree strongly." It was necessary for the theory being tested that information about sex have a potential "usefulness" to its possessors.[11] Therefore, only those students who showed moderate to high agreement with the statement (positions 3, 4, or 5) were selected for further study. Only 11 students indicated little or no interest (positions 1 or 2) in obtaining information about sex. These students were removed from the pool of potential subjects.

Approximately four weeks after the completion of this scale, 160 students were asked by the experimenter to participate in a research project as part of their course requirements. A total of 133 male and female students ($\underline{M}$ age = 20.8 years) were recruited to participate in this phase of the study. The data from eight students were not included in the final analysis because it was learned during debriefing that they were suspicious about the purposes of the study, and

the data from five randomly selected students were discarded in order to make the cell ns equal. The final sample of 120 male and female students was divided into two groups of 60 students each. Each group was then randomly assigned to one of the two availability conditions.

Procedure

Upon arrival at the testing room, students who had signed up for one of eight experimental sessions were told that they had been selected to participate in a study concerning the media viewing behavior of students. Students were given a test booklet which contained an introductory statement explaining that the study was being conducted in cooperation with a major motion picture distribution company that was interested in collecting data about some current films. This procedure was designed to be similar to the process of people reading reviews of films before deciding to attend one of them. Students were asked to read a series of short statements and quotations that might have appeared in movie reviews for each of the three films. The statements in the test booklet were randomly ordered across conditions so as to prevent the influence or order effect. One of the films was described as "The story of a young architect and language teacher whose chance meeting one Sunday afternoon eventually leads to a deeper relationship . . . Very Sexually Explicit!" Students also received information about two additional films, both of which were included to disguise or conceal the intent of the experimental inductions. Statements about these two films were designed to be of approximately equal interest so as not to affect the subjects' responses.

Finally, students completed postexperimental questionnaires for each of the three films. The questionnaires included the message valuation scale and scales designed to assess the effectiveness of the experimental manipulations. Approximately one week after their participation in the experiment, students were informed by letter of the general purpose of the study and apprised of the nature and point of the deceptions. At this time, students also were given a pass to see Francois Truffaut's film, Shoot the Piano Player. Care was taken to insure that none of the students were upset that they had not been given a pass to see one of the films they originally had been asked to evaluate.

Availability. The availability variable was manipulated by changing the spoken and written informational statements that described the conditions under which students could obtain a pass to view the sexually explicit film. Half of the students received information that the target film had been objected to by the University because of its sexually explicit content. This information was followed with the revelation that in spite of the prohibitions against its transmission, the sexually explicit film would be shown one time only to a small group of students. The remaining half of the students were told that the sexually explicit film had been "approved" by the University for use in the research study and that none of the three films had been censored or restricted in any way whatsoever.

Valuation. The postexperimental questionnaire, referred to as the "message valuation scale," consisted of ten items with scale end points of 1 (Disagree very strongly) and 6 (Agree very strongly). Students were asked to respond to items such as: (1) "This film sounds really good," (2) "I am eager to see this film," and (3) "I have no interest in seeing this film."

The development of this instrument was conducted as part of the preexperimental stage of this study. As a first step in scale construction, 21 positively and negatively worded items were written to parallel the "message value" construct as originally conceptualized by Brock. In order to maximize the effectiveness of individual test items beyond the desired level of $r = .80$, this set of 21 items was administered to 62 undergraduate students enrolled in introductory speech communication courses at the University of Denver. Students used a Likert-type scale to indicate their degree of agreement of disagreement with each statement, and responses to each item were correlated with the total test score. Eight of the original 21 items showed Pearson

product-moment correlations of less then .80 and were not included in the final set of items. Three additional items were eliminated that were the positively or negatively worded reflections of other items on the scale. The remaining 10 items had correlations that ranged from .8317 to .9149 and that were significant at the .001 level. When these 10 items were subjected to Cronbach's Alpha test of internal consistency, the resultant value was .9671, a very strong indication that all the items in the test were measuring the same characteristic.

RESULTS

Preliminary Analysis

Three scales with ranges of seven points and bounded with the phrases "Disagree very strongly" and "Agree very strongly" asked students to assess the effectiveness of the message availability manipulations. One-way analyses of variance performed on the responses of 120 students to these manipulation check items indicated that students perceived the message availability manipulations as intended. First, students in the censored condition perceived the film as considerably less available ($\underline{M}$ = 5.57) than did students in the approved condition ($\underline{M}$ = 1.42), $\underline{F}(1, 118) = 1550.682$, $\underline{p} < .0001$. Second, students in the censored condition perceived that it took considerably more effort to acquire a pass to see the censored film ($\underline{M}$ = 5.72) than did students in the approved condition ($\underline{M}$ - 1.52), $\underline{F}(1, 118) = 1092.343$, $\underline{p} < .0001$. Finally, students in the censored condition perceived the target film as considerably more "restricted" ($\underline{M}$ = 5.82) than did students who were told that the film was available to anyone who wanted to see it ($\underline{M}$ = 1.22), $\underline{F}(1, 118) = 2757.291$, $\underline{p} < .0001$.

A one-way analysis of variance performed on students' responses to the item, "This film is sexually explicit" failed to result in significance. As intended, students in both the censored ($\underline{M}$ = 5.70) and approved ($\underline{M}$ = 5.58) conditions perceived the target film as sexually explicit. These results are supportive of those obtained by Zellinger et al., and suggest that differential information regarding the restriction condition did not suggest any differential content, or increase the degree to which students perceived the target film as sexually explicit.

Test of Hypothesis

A one-way analysis of variance, performed on the mean message valuation scores, resulted in one significant effect: a main effect for the availability variable. The main effect for the availability variable indicated that students in the restriction condition valued the sexually explicit film significantly less ($\underline{M}$ = 33.97) than did students in the no-restriction condition ($\underline{M}$ = 39.49), $\underline{F}(1, 116) = 5.832$, $\underline{p} < .017$. The availability condition accounted for 21% ($n^2 = .21$) of the variance in the message valuation scores. Contrary to the predicted outcome, this effect demonstrated that the valuation of the sexually explicit film was much less in the restriction and delay condition than in the approval condition. Thus, commodity theory's prediction that a message will be valued to the extent that it is unavailable was not supported.

DISCUSSION

This study predicted that the valuation of the sexually explicit film would be greater in the restriction condition than in the approval condition. The results of the test of this hypothesis failed to support the commodity theory prediction that restricting a message, and thus limiting its availability, will result in an increase in the valuation of that message. Analysis of variance demonstrated that the valuation of the sexually explicit film was significantly less in the approval condition. Thus, the prediction that legal attempts to reduce the exposure of individuals to pornography may result in an increased desire to obtain these communications was not supported by the results of this study.

One possible explanation that may account for the students' devaluation of the restricted film may be derived from Festinger's theory of cognitive

dissonance.[12] According to Festinger, cognitive dissonance exists when individuals hold two beliefs or cognitions that are inconsistent with each other. For example, individuals in the present study who indicated that it was important for them to obtain information about sex were confronted with a dissonance arousing situation when they were told that this information was unavailable. One way in which dissonance may have been reduced by students was for them to devalue the sexually explicit film. When students were told that the film was censored, they may have reduced the importance of the film by convincing themselves that it probably was not any good or that they would just as soon see one of the other two films.

Greenwald, in his review of commodity theory, supported this interpretation when he argued that under some circumstances dissonance reduction may complement Brock's unavailability principle, so that available information is seen as attractive and unavailable information is rejected. As Greenwald suggested, life would be exceedingly difficult if the most attractive communications were always the most difficult to obtain.[13]

Another possible explanation for the devaluation of the restricted film may be that students had the tendency to respond to the message valuation scale in such a manner as to appear "socially desirable." Social desirability, as described by Edwards, is a response set to answer questions about oneself in the socially approved manner.[14] The possibility exists that students in the present study answered the items so that their responses agreed with what social consensus (i.e., the University) had indicated as the most desirable response. That is, students may have responded more favorably to the unrestricted film because its approval by the University indicated its socially desirable quality, or the students' lack of any abnormal interest in sex.

Though no direct evidence can be offered to support this interpretation, it is interesting to note that analyses of variance performed on students' mean valuation scores for the sexually explicit film in the restricted condition resulted in two significant Fs. A main effect for the gender factor indicated that females (n = 27) responded in the more socially acceptable manner to the target film by valuing it less (M = 29.67) than males (n = 33) in the restricted condition (M 37.48), $F(1, 58) = 4.818$, $p < .03$. Also, a main effect for the religiosity factor indicated that religious students (n = 37) responded in the more socially acceptable manner to the target film by valuing it less (M = 29.92) than non-religious students (n = 23) in the restricted condition (M = 40.48), F (1, 58) = 8.946, $p < .004$. Additional research is recommended to determine whether a social desirability response set significantly influenced the results of the present study and whether the devaluation of the restricted film could be accounted for in terms of the students' tendency to respond stereotypically to that which is more socially acceptable.

Finally, there is the possibility that students' previous experience viewing X-rated materials contributed to the devaluation of the censored film. Although part of the "thrill" of pornography may be derived from breaking the formal "rules" or "laws" a society imposes on the acquisition of such materials, once these rules are broken the pornography may lose some of its inherent pleasure. Research by the National Commission on Obscenity and Pornography, for example, suggested that repeated exposure to erotic materials resulted not in continued excitement or interest, but in satiation, or a marked diminution of sexual arousal and interest.15 Thus, it is possible that students in the present study may have experienced such frequent access to sexually explicit materials that they very quickly became satiated with them.

Perhaps the most important implication of this study is that legal attempts to decrease the availability of sexually explicit communications may have the attitudinal effect on individuals that is intended. That is, instead of increasing the desirability of sexually explicit information as commodity theory predicts, restrictions may decrease its desirability. The possibility exists, then, that attempts to curtail the distribution of pornography through tougher legislation may heighten the perceived unavailability of these communications, but also may reduce the efforts of individuals to obtain them.

This study also raises important questions with regard to commodity theory. For instance, it is likely that the effects of restriction upon message valuation may not be the same for sexually explicit messages as they are for other kinds of communication (i.e., political, organizational, or interpersonal). Though research by Zellinger et al. provided initial support for the commodity theory prediction that restricting a sexually explicit message (i.e., a book) will lead to an increased desire to obtain that commodity, these effects may no longer apply to pornographic communications. It seems reasonable to suggest that a possible trend toward conservatism on college campuses across the country may have an impact on the valuation of such communications.[16] Indeed, one possible interpretation of the results obtained in the present study is that students viewed the restricted film as being much too experimental and counter to their basic philosophy of restraint. This sympathy for traditional conservative values may have acted against commodity theory principles in the present study.

Endnotes

[1]See, for example, the results reported by Richard D. Ashmore, Vasantha Ramchandra, and Russell A. Jones, "Censorship Changes Attitudes," N.J.E.A. Review, 45 (1971), 17; 47; Stephen Worchel and Susan E. Arnold, "The Effects of Censorship and Attractiveness of the Censor on Attitude Change," Journal of Experimental Social Psychology, 9 (1973), 365-77.

[2]Timothy C. Brock, "Implications of Commodity Theory for Value Change," in Psychological Foundations of Attitudes. ed. A.G. Greenwald, T. C. Brock, and T.M. Ostrom (New York: Academic Press, 1968), pp. 243-75.

[3]Ibid., p. 246

[4]Ibid., p. 246

[5]Howard L. Fromkin and Timothy C. Brock, "Erotic Materials: A Commodity Theory Analysis of the Enhanced Desirability That May Accompany Their Unavailability," Journal of Applied Social Psychology, 3 (1973), 222.

[6]Ibid., 219-231

[7]David A. Zellinger, Howard L. Fromkin, Donald E. Speller, and Carol A. Kohn, "A Commodity Theory Analysis of the Effects of Age Restrictions Upon Pornographic Materials," Journal of Applied Psychology, 60 (1975), 94-99.

[8]Ashmore et al., p. 17.

[9]Zellinger et al., p. 94.

[10]Timothy C. Brock, "Erotic Materials: A Commodity Theory Analysis of Availability and Desirability," in Vol. II of Technical Reports of the Commission on Obscenity and Pornography (Washington, D.C.: GPO, 1971), p. 131..

[11]See Brock, p. 246.

[12]Leon Festinger, A Theory of Cognitive Dissonance (Stanford, Calif.: Stanford University Press, 1957).

[13]Anthony G. Greenwald, "On Defining Attitude and Attitude Theory," in Psychological Foundations of Attitudes, ed. A.G. Greenwald, T.C. Brock, and T.M. Ostrom (New York: Academic Press, 1968), pp. 379-80.

[14]Allen L. Edwards, The Social Desirability Variable in Personality Assessment and Research (New York: Holt, Rinehart & Winston, 1957).

[15]James L. Howard, Clifford B. Reifler, and Myron B. Liptzin, "Effects of Exposure to Pornography," in Vol. VIII of Technical Reports of the Commission on Obscenity and Pornography (Washington, D.C.: GPO, 1971), pp. 97-169.

[16]Peter Steinfels, "The Reasonable Right," Esquire, 13 Feb. 1979, pp. 24-30.

INTERNATIONAL EXCHANGE OF SCIENTIFIC INFORMATION DURING CRISIS: A CASE STUDY IN THE RIGHT TO COMMUNICATE

Daniel Ross Chandler
Rutgers University

Following Soviet military invasion of Afghanistan and the internal exile of Andrei Sakharov, the Carter administration indicated indignation by restricting United States scientific and technical interactions with the Soviet Union. During February, 1980, the Commerce Department persuaded the American Vacuum Society to withdraw the invitations extended to Soviet-aligned nationals to attend an international conference on magnetic-bubble memories conducted in Santa Barbara, California. Further regulations required registrants representing foreign nations to sign a letter of assurance pledging themselves not to divulge information communicated during the conference to persons from various Communist countries. Late in February, the Optical Society of America and the Institute of Electrical and Electronics Engineers conducted an international conference on lasers and electro-optical systems and inertial confinement fusion in San Diego, California. The State Department refused to grant visas to Soviet applicants and prohibited a Russian postdoctoral scholar studying at the University of Texas from attending.

United States government technology agreements with the Soviet Union in highly visible areas including lasers are deferred, and highly visible activities that constitute bilateral agreements between the Americans and the Soviets are postponed. These regulations restrict the international exchange of scientific information about physics, microbiology, electro-metallurgy, chemical catalysis, agriculture, peaceful employment of atomic energy, space, environmental protection, artificial heart research, energy, medical science, public health, housing, the oceans, construction, and transportation.[1] Humanitarian activities and endeavors advantageous for the United States are reviewed case by case.

Consistent with these regulations established with the State Department, the Department of Energy instructed the directors serving its national laboratories and subsequently Department of Energy contractors to clear with that Department all communication with Soviet citizens. Letters addressed to these contractors advised that personal relationships between these contractors and the Soviets should remain correct but unenthusiastic until further notice, that the Soviets will be permitted to attend international conferences conducted in the United States, and that American relations with Soviet representatives in multilateral forums will continue.

On February 11, 1980, the organizers who planned the First International Conference on Bubble Memory Materials and Process Technology were contacted by the Compliance Division, Office of Export Administration, Commerce Department. Controversy and confusion grew among the conference organizers, the American Vacuum Society officers, and officials from the Commerce and State Departments. The conference organizers and the technical society officers were informed that the conference was covered under Section 379.1 (b) of the United States Export Administration Regulations, under which spoken exchanges of information in the United States with foreign nationals constitutes the export of technical data; and under Section 379.4 (f), under which a validated license from the Office of Export Administration is required before this technical information is exported to Eastern European destinations and prior written assurance must be obtained from foreign importers that this technical information will not be reexported to proscribed destinations. Knowledge concerning these governmental regulations was communicated to the conference organizers from Compliance Division administrators through an exchange that commenced five days preceeding the international conference's scheduled beginning. The organizers were informed that the conference might consider anything coming within the "public domain." The conference was planned without publishing the scholarly papers in advance and without plans for eventually publishing the conference proceedings.

State Department officials confirmed a concern about requiring foreign scholars to sign letters of assurance and suggested that representatives from Poland, Hungary, and Russia be disinvited. The State Department possessed no authority to require this action; however the conference organizers complied with the request. State did not want the Chinese excluded, but Commerce insisted. Three Chinese scientists arrived in Santa Barbara on February 18. The next day, an official from the Compliance Division said that the Chinese must be excluded from the international conference and that letters of assurance must be signed by all non-United States participants preceeding their admission. Failure to comply with these governmental regulations could result in penalties to the American Vacuum Society and the society's president amounting to a ten-thousand dollar fine; a fine five times the value of the export, or one-hundred thousand dollars, whichever is greater; and/or ten years imprisonment. The technical society's president agreed to require the foreign participants to sign a letter of assurance that was composed and communicated through a telephone conversation with a Compliance Division official thirty minutes before registration was scheduled to commence. The signers assured the technical society that information gained during the conference would not be divulged to nationals from eighteen countries unless prior authorization is granted by the Export Administration. Under the prohibition were several Eastern European nations except Yugoslavia and the People's Republic of China. Nearly thirty foreign representatives, including approximately half who were Japanese, signed a letter of assurance during registration. On February 21, the Chinese signed a letter of assurance that excluded the People's Republic of China from the list, and the Chinese were admitted as conference participants.

Before the San Diego international conference convened on February 26, a State Department official informed the executive secretary of the Optical Society of America that visas for eight Russian applicants were denied. V.A. Komotskii, a postdoctoral Russian scholar from People's Friendship University in Moscow who was studying at the University of Texas, was denied permission from the State Department to attend the international conference, although Komotskii was permitted to visit San Diego the week preceeding or following the conference. A State Department official explained that the Russians were excluded because the meeting featured a large exhibit of equipment. The government official confirmed that State's action constituted a response to the Soviet invasion of Afghanistan and that subsequent technical society conferences would be evaluated within the Afghanistanian situation. No Russians attended this international conference in which approximately three thousand three hundred delegates participated. Over ten percent of these participants were foreign. Conference proceedings were reported and distributed during the meeting.

Concerning the magnetic-bubble conference, a United States government spokesman announced that the laws and regulations evoked and applied to this meeting were enacted years earlier and that these legal standards would be enforced. This spokesman explained that "embargo" means not merely sending technical devices but includes spoken communication. Imposing these legal regulations caused an international censorship that was described in Physics Today:

> Curtailment of U.S. government interactions with Soviet science is now being extended to communications. Most government activities concerning science and technology agreements already are screened by the office of the undersecretary for security assistance, science and technology at the State Department, the National Security Council and OSTP. This includes communications from all the technical agencies administering bilateral activities, including NSF, DOE, NASA, EPA and HEW. Now a general policy review has extended this screening to communications. Although routine scientific exchanges of information will not be affected, plans for future trips and new activities will.[2]

Evidently, officially sponsored government meetings and official government technology agreements between the United States and the Soviet Union in highly visible areas such as lasers are deferred. The government has not indicated that additional international conferences will be affected, and private visits of

individual scientists continue. The associate director of the Office of Science and Technology Policy initiated an interagency review by examining U.S. policies to ensure that these standards protect American traditional support for free exchange of scientific information and simultaneously control Soviet access to American high technology. The Department of Defense commenced a reappraisal of the Commodity Control List that contains approximately two hundred items that require an export license when they are sent to certain countries.

Nevertheless, estrangement between United States and Soviet Union scientists persists. In late February, the National Academy of Sciences voted to suspend all bilateral symposia, seminars, and workshops with the Soviet Academy of Sciences during the succeeding six months as a response to Andrei Sakharov's internal exile.

Prominent scientific-technical organizations and their executives strongly condemned Carter administration infringements upon international communicative freedom. Championing the international exchange of scientific information, these professional scholarly societies and their leaders complained. In late February, the Committee of Concerned Scientists, containing approximately four thousand members, registered criticisms with the Secretaries of State and Commerce protesting the denial of visas to Soviet scientists who planned to participate in international scientific conferences. In a letter addressed to Commerce Secretary Klutznick on March 11, Herman Feshback, President of the American Physical Society, criticized these actions by Commerce Department representatives that "suggests that the United States government is willing to adopt tactics that a free, open and self-confident society should shun."[3] Feshback, a Massachusetts Institute of Technology scientist, contended that these controversial measures cannot achieve the goal of keeping scientific information from the Communist countries, that requiring foreign guests to sign a secrecy pledge humiliated and embarrassed the entire American scientific community, and that the American Physical Society has insisted that any scientist has the right to attend and contribute to scientific meetings.[4] In a similar letter addressed to State Secretary Vance dated March 11, Feshback condemned the various measures restricting scientific information that Carter administration officials employed to support foreign policy objectives established by the United States government. Feshback, who heads the thirty-thousand member American Physical Society, denounced the signing of a secrecy pledge by foreign scientists; the issuance of a Department of Energy directive imposing a thorough examination of communication between United States and Soviet Union scientists; and last-minute denial of visas to Soviet-aligned scientists invited to attend international scientific conferences conducted within the United States. Renouncing unwarranted regulations abridging freedom of speech, Feshback told Vance:

> The government can restrict, or even forbid, communication between American government officials and foreign citizens. But we do not accept that the government has the right to state to private citizens whose research is supported by public funds that "any communication with the Soviets, either by letter, telex, or phone must be cleared" by a DOE official . . .
>
> The recent restrictions on travel imposed by the State Department, when combined with the actions of the Commerce Department, are bound to generate legitimate opposition to the holding of scientific conferences in the U.S. They undermine efforts by U.S. scientists to bring a greater measure of freedom to international scientific communications.
>
> We are concerned that these actions, which are reminiscent of the tactics used by totalitarian regimes, will be perceived as a surrender of values that are basic to a free and open society . . .
>
> We are convinced that they will act to isolate the U.S. scientific community, and thereby damage the U.S. scientific

enterprise. It is also clear that by these actions the government has compromised the long-standing efforts by organizations like the American Physical Society, and by thousands of individual American scientists, to help oppressed colleagues such as Yuri Orlov and Andrei Sakharov. . . .[5]

Scientists for Orlov and Scharansky, a two-thousand five-hundred member organization, sent Vance a letter in March deploring Carter administration actions. On March 17, 1980, John L. Vossen, President of the American Vacuum Society, addressed a letter to Secretary Vance, Secretary Brown, presidential science advisor Frank Press, Benjamin Huberman at the Office of Science and Technology Policy, and Eugene Fubini who chairs the Defense Science Board. Protesting the Export Administration regulations, Vossen declared:

> At bottom, we are talking about the transfer of information. There is absolutely no distinction among transfers at closed meetings, open meetings, casual conversations or publications in journals or books. . . .
>
> Aside from raising questions of free speech and press, this action jeopardizes international scientific and engineering meetings in this country. . . .
>
> Possibly the greatest danger to Science and Engineering in the United States relates to the absurd notion that a technical society is an "exporter" of technical data simply by virtue of providing a forum for scientists to exchange information. No society can live with such a ruling. If that ruling stands, most technical societies will simply cease to function, to the great detriment of the United States. . ..
>
> Some newspaper accounts erroneously reported that the Chinese signed a letter of assurance with the Peoples Republic of China still on the list. Because of this, the Chinese attendees were detained at the Chinese U.N. Mission after the meeting until I sent a letter to the Mission indicating that they did not do so. I was given to understand that they were being held for treason pending receipt of that letter. . . .[6]

Vossen condemned "this unprecedented, frivolous and foolish exercise of ham-handed bureaucratic power over a technical meeting."[7] Responding to Feshback with a letter dated March 28, Undersecretary of State Nimetz maintained:

> The Administration has taken the position that private members of the U.S. scientific community should be able to decide for themselves the extent to which they wish to carry on exchanges and contacts with the Soviet scientists. . . .
>
> You should know that our scholars, under what is supposed to be a reciprocal agreement, are virtually never allowed to travel to Soviet scientific conferences. . . .[8]

Nimetz's response raised an essential question: Why should a Soviet scientist be allowed to attend a laser conference in the United States, but an American scientist be denied permission to attend similar conferences in Russia? Ironically, Carter administration actions happened during a meeting of the Scientific Forum in Hamburg, where Western delegates protested similar regulations imposed by the Soviet Union. Attempting to remedy the diplomatic difficulty, Harvard biologist John T. Edsall, chairman of the American Academy for the Advancement of Science Committee on Scientific Freedom and Responsibility, asked State and Commerce administrators to explain their actions. Accepting the invitation, an official from the Commerce Department stated that the Export Control Act was enacted thirty years earlier and that this was the first known time when that statute was invoked and applied to information exchanged during an

international meeting. Editorial writer Harold L. Davis indicated:

> The Administration has stunned the scientific community by choosing, as a part of its retaliatory response to the Soviet invasion of Afghanistan, to begin abruptly the enforcing of regulations controlling the "export" of high-technology information. . . .
>
> It is clear that the government's restrictions will not really succeed in denying any information to anyone and at best is a symbolic gesture to embarrass the Soviets. But the cost of this gesture has been a far greater embarrassment for the US as well as the risk of isolating American scientists from the rest of the international community.[9]

These problems provoked by United States government regulations imposed upon the international exchange of scientific information during a political crisis necessitate several answers.

Attempting an application of sanctions punishing the Soviet Union for invading Afghanistan and exiling Sakharov, Carter administration officials invoked an obscure thirty-year-old export regulation and attempted to control freedom of communication. This governmental action failed to prevent the exchange of scientific information and stimulated a serious controversy about abridgments upon international communicative freedom. Securing the implementation of Carter administrations foreign policy goals resulted in censorship characteristic of a dictatorial regime. The philosophy that a sovereign state can regulate and prohibit individual communicative freedom secured dramatic expression not merely through Carter administration representatives, but through two delegates from Eastern European socialist countries who attended the international invitational conference on world communication conducted at the Annenberg School of Communications, The University of Pennsylvania, May 12-14, 1980. Walery Pisarek from Poland contended that social-political-economic systems determine communication process, constructs, and systems and that socialist ideology stems from Marxist conceptions about class struggle.[10] A conviction that the socialist state should regulate communication was presented by Zoltan Jakab from Hungary, who maintained that communication systems are the products of social systems and that no one should conclude that the communication systems and philosophies existing within highly industrialized Western nations are necessarily superior.[11]

Significant segments within the Ameircan scientific community condemned these regulations with a commendable discourse that championed human communicative freedom and asserted essential human values.

Carter administration regulations imposed upon these international conferences dramatize the unanswered questions surrounding an individual's right to travel abroad and exchange information. A fundamental question remains: Is the Export Control Act constitutional? Legal precedent for regulation exists. In Zemel v. Rusk Zemel, contending that he sought information about the Cuban revolution, sued the Secretary of State for refusing him, a United States citizen, a passport to Cuba. The Supreme Court concluded that Secretary Rusk's action did not infringe upon Zemel's First Amendment freedom.[12] Former United States Attorney General Ramsey Clarke's trip to Iran violated Carter administration sanctions against an individual's rights to travel abroad and exchange information. Clarke's travel raises serious questions about the President of the United State imposing prohibitions, penalities, and punishment.

The technical-scientific societies controversy indicates a perplexing problem that has gained serious study from communication scholars during the last ten years. Historically the international "right to communicate" stems from the Universal Declaration of Human Rights approved by the United Nations General Assembly in 1948. Without providing a comprehensive definition for this general human right, the Declaration specified several rights. Article Twelve asserts

no one shall be subjected to arbitrary interference into one's privacy and correspondence, and Article Eighteen states that everyone has the right to freedom of thought. Article Twenty acknowledges the right to join and not to join an organization. And Article Nineteen affirms the human right to seek, receive, and impart information. Former United Nations Office of Public Information head Jean d'Arcy emphasized an emerging international "right to communicate" by predicting a time when the Universal Declaration will contain a more extensive right than information access.[13]

Since the "right to communicate" as a theoretical conception was enunciated by d'Arcy during 1969, scholars have vested that right in mankind's essential humanity. In 1975 d'Arcy avowed that communication is essential for humans to become human.[14] A working committee convened in Cologne concluded that "humanity's need to interactively communicate--and its right to do so--is essential to the humanness of being."[15] Fisher stated that the right to communicate constitutes a primary and absolute human right that is the individual's entitlement stemming from one's dignity as a human person.[16] Cocca called the right to communicate a universal human right vested in mankind.[17] Elsewhere Cocca explained that the interests of humankind transcend those of any state considered individually; that humankind is served when the interests of all states are recognized and respected within the international community; and that communication facilities, including the radio frequency spectrum and the geostationary orbit, belong to humankind as a common heritage.[18] Bloom believed that a right to communicate, as an essential human freedom, is presupposed in nearly all activities sanctioned by law in countries throughout the world.[19] Dean argued that every person has the right to full equality of opportunity to communicate with any other person through any communication facility.[20] Cocca added that as a direct consequence of the gregarious inclinations of humans, the right to communicate constitutes an essential element, a primary and fundamental freedom appertaining to the human being.[21] Cleveland concluded that the traditional core for an internal human right is security of the person.[22] Cleveland concluded that the traditional core for an internal human right is security of the person.[22] Scholars envision the "right to communicate" as an international human communicative freedom vested in human nature.

Needed are a comprehensive, multicultural, culture-free definition for universal communicative freedom that establishes essential human values and long-range objectives; a collection containing specific subordinate communication rights and responsibilities capable of legal definition and pragmatic implementation; the clustering of anticipated problems and expected questions under various groupings; and an incisive international analysis studying humankind's sociocultural communication environment from a global perspective.

Vested in man's human nature, a multicultural conception should provide a theoretically sophisticated and pragmatically applicable definition for the "right to communicate." Providing substantive content for that emergent concept and describing communication as a dynamic process, Sommerlad said that the essential idea within the right to communicate is the idea of dialogue, exchange, response, sharing, and two-way information flow between mutually respected communicators.[23] Anim acknowledged this dynamism when he stated that "right to participate" is preferable in some contexts to the "right to communicate," described participation as the degree to which individuals take part in discussion and decision-making, and emphasized that increased participation is the ultimate objective of the "right to communicate."[24] Indicating some specific elements within the communication field, Hardt said that the study of communication rests on the recognition of the social norms defined as order, law and morality.[25] Tonkin insisted that a consideration of language remains fundamental in formulating an international "right to communicate."[26] Defining an international "right to communicate" requires disciplined scholarship through intercultural and interdisciplinary research utilizing humankind's accumulating and constantly expanding knowledge. Pertinent preliminary studies are accessible.[27]

Several methodologies are proposed. Fisher suggested that the "right to communicate" might be developed by establishing the primary focus for the

concept, defining communication, describing the essential freedom and entitlements, specifying the limitations and sanctions that might be imposed, stating the criteria for employing these regulations, and identifying the responsibilities of communication-rich countries in aiding communication-poor countries.[28] M'Bow indicated that this international communicative freedom might be defined by using such categories as freedom, responsibility, balance, universal access, and participation.[29] And Wiio suggested a three-dimensional framework embracing communication, message and channel.[30]

When a traditional conception of communication as transmitting information from an individual to an individual becomes broadened to encompass communication as an essential requirement for species survival and human self-actualization, then a humanistic definition for the "right to communicate" can be formulated consistently with (a) a contemporary understanding of mankind's essential humanity and (b) the humanistic knowledge growing from "secular" and "sacred" sources. Establishing this emergent, evolving conception might provide the most practical method for establishing international fraternity and fellowship simply because communication creates community.

Endnotes

[1]"Government bars Soviets from AVS and OSA meetings," Physics Today 33 (April, 1980), 81.

[2]"Government bars Soviets from AVS and OSA meetings," pp. 82-3.

[3]Information in a letter addressed to Phillip M. Klutznick from Herman Feshback and dated March 11, 1980, p. 1.

[4]Letter to Klutznick from Feshback, pp. 1-2.

[5]Information in a letter addressed to Cyrus Vance from Herman Feshback and dated March 11, 1980, p. 2.

[6]Information in a letter addressed to Philip M. Klutznick from John L. Vossen and dated March 11, 1980, pp. 2-3.

[7]Letter to Klutznick from Vossen, p. 3.

[8]Information in a letter to Herman Feshback from Matthew Nimetz and dated March 28, 1980, pp. 1-2.

[9]Harold L. Davis, "Scientific freedom: political hostage," Physics Today 33 (April, 1980), 104.

[10]Walery Pisarek, "Keynote of The Worlds II," a paper presented at an international invitational conference at the Annenberg School of Communications, the University of Pennsylvania, Philadelphia, Pennsylvania, May 12-14, 1980.

[11]Zoltan Jakab, "Keynote of Three Worlds Two," a paper presented at an international invitational conference at the Annenberg School of Communications, the University of Pennsylvania, Philadelphia, Pennsylvania, May 12-14, 1980.

[12]See Zemel v. Rusk (381 U.S. 1, 1965).

[13]Jean d'Arcy, "Direct Broadcast Satellites and the Right to Communicate," EBU Review 118 (August, 1969), 14-18.

[14]Jean d'Arcy, comments, notes taken from Working Committee IV at the International Broadcast Institute meeting, Cologne, Germany, September 1975, p. 6.

[15]Bert Cowlan, rapporteur comments, Working Committee IV Introduction presented at the International Broadcast Institute meeting, Cologne, Germany, September 1975, p. 1.

[16]Desmond Fisher, "The Right to Communicate: Towards a Definition," a paper submitted to the MacBride Commission, The United Nations, New York, November 1978.

[17]Aldo Armando Cocca, "Where the Right to Communicate is Vested," a paper prepared for the Unesco Expert Meeting on the Right to Communicate, Stockholm, Sweden, May 1978.

[18]Aldo Armando Cocca, "The Radio Spectrum Resource as a Common Heritage of Mankind," a lecture presented at the East West Center, Honolulu, Hawaii, September 1976.

[19]Harry Bloom, "The Right to Communicate," a working paper prepared for the Legal Research Unit in Communications, University of Kent, Canterbury, England, 1977.

[20]Sydney Dean, "Principles of Public Policy. . .," a statement for the Sub-Committee on Communications, Committee on Interstate and Foreign Commerce, United States House of Representatives, Washington D.C., May 10, 1978.

[21]Aldo Armando Cocca, "The Right to Communicate, Some Reflections on its Legal Foundation," a paper submitted to the MacBride Commission, the United Nations, New York, November 1978.

[22]Harlan Cleveland, "The Chair Reaction of Human Rights," a paper presented at the Aspen Institute for Humanistic Studies, Princeton, New Jersey, December 1977.

[23]E. Lloyd Sommerlad, "Free Flow of Information, Balance, and the Right to Communicate," in New Perspectives in International Communication Jim Richstad, ed. (Honolulu, Hawaii: East-West Communication Institute, 1977), pp. 22-32.

[24]Goodwin Anim, "The Right to Communicate," a paper prepared for the Unesco Expert Meeting on the Right to Communicate, Stockholm, Sweden, Mary 1978.

[25]Hanno Hardt, "Communication, Law and Morals," a paper prepared for Plenary Session 7 on the Right to Communicate, International Congress of Communication Sciences at Kongresshalle, West Berlin, Germany, June 1977.

[26]Humphrey Tonkin, "Defining Language as a World Problem: The Role of Nongovernmental Organizations," a paper presented at the annual convention of the International Studies Association, St. Louis, Missouri, March 1977. See Humphrey Tonkin, "Language and International Communication: The Right to Communicate," a paper presented by the Universal Esperanto Association to the Unesco Expert Meeting on the Right to Communicate, Stockholm, Sweden, May 1978. See Humphrey Tonkin, "A Right to International Communication?," a paper presented at an international invitational conference at the Annenberg School of Communications, the University of Pennsylvania, Philadelphia, May 12-14, 1980.

[27]For further information see Unesco, "Towards a Definition of the Right to Communicate," a working paper prepared for an Expert Meeting, Paris, France, April 5, 1978. See Unesco, "Final Report of the Meeting of Experts on the Right to Communicate," Stockholm, Sweden, May 8-12, 1978. Two informative anthologies are: L.S. Harms, Jim Richstad, and Kathleen A. Kie, eds. Right to Communicate: Collected Papers (Honolulu, Hawaii: Social Sciences and Linguistics Institute, 1977) and L.S. Harms and Jim Richstad, eds. Evolving Perspectives on the Right to Communicate (Honolulu, Hawaii: East West Communication Institute, 1977). Especially helpful is Academy for Educational Development, The United States and the Debate on the World "Information Order" (Washington, D.C.: Academy for Educational Development, 1978).

[28]Desmond Fisher, "Towards a Definition of the Right to Communicate: A Structured Approach to the Task," a paper prepared for the Unesco Expert Meeting on the Right to Communicate, Stockholm, Sweden, May 1978.

[29]Amadou-Mahtar M'Bow, "Communication's Decisive Role in Development," Communicator 13 (January, 1978), 5-12.

[30]Osmo A. Wiio, "Open and Closed Mass Media Systems and Problems of International Communication Policy," Studies in Broadcasting 13 (1977), 67-90.

THE SUPREME COURT AND THE FIRST AMENDMENT: 1979-1980

William A. Linsley
University of Houston

I. The Business of the First Amendment is Business

The Supreme Court for many years distinguished between commercial speech, expression related soley to the economic interests of the speaker and audience, and non commercial speech having to do with political, social, and artistic controversy. Commercial speech was unprotected by the First Amendment despite the claims of businessmen that the financial implications of profit-making should not deprive those involved in commerce from exercising the rights of free speech and press. However, the involvement of business, at first banks and now utility companies, in debate over their business practices has resulted in Supreme Court decisions which provide commercial business with constitutional rights previously reserved only for others.

Ironically, pressure, not from the business community, but from consumer groups, at times the natural enemy of business, first prodded the Court into acknowledging that protecting information about business practices is as much in the public interest as protecting information in the political or social arenas. This acknowledgement occurred in 1976 when the Court ruled that comparative drug pricing should be public knowledge and thus protected by the First Amendment. Here, however, the pharmaceutical companies resisted the protection sought by those committed to consumer interests rather than the interests of business (Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748; Free Speech Yearbook: 1976, p. 24).

Nevertheless, by 1978 in First National Bank of Boston v. Bellotti, 435 U.S. 765; Free Speech Yearbook: 1978, p. 47, a major corporation pressed the case for protected commercial speech by asserting before the Supreme Court free speech rights in conflict with a state statute prohibiting bank advertising attacks against a tax deemed unfavorable to business. The Court narrowly agreed with the bank that the free flow of commercial information could not be impaired, and the anti-tax advertising campaign became protected expression.

During the recent Court term restrictions on the commercial speech of electric utility companies for prohibiting promotional advertising and for using bill inserts to support construction of nuclear power plants were struck down in Central Hudson Gas and Electric v. Public Service Commission of New York, 48 LW 4783 (1980); and Consolidated Edison Co. of New York v. Public Service Commission of New York, 48 LW 4776 (1980)*.

Justice Powell responded to the Public Service Commission's ban on promotional advertising by utilities in an opinion which noted that although the Constitution accords a lesser protection to commercial speech than to other

*Official U.S. case citations for the 1979-1980 Supreme Court term do not appear because they are assigned subsequent to the preparation of this article.

guaranteed expression, the First Amendment nevertheless protects commercial speech from unwarranted government regulation. For commercial speech to fall within the First Amendment it must concern lawful activity and not be misleading. Any asserted governmental interest must be substantial and any regulation in support of that interest must not be more extensive than necessary to serve that interest. The Court granted New York's substantial interest in energy conservation but found that the Commission's order suppressed speech which did not impair the legitimate state effort to encourage energy conservation. In fact, Powell contended, the Commission's prohibition on promoting electrical services prevents the utility company from promoting services such as heat pumps and partially-electric solar systems which use less energy. Thus, the total ban on promotional advertising suppressed speech more extensively than necessary to serve a substantial state interest in energy conservation.

Justice Rehnquist's dissent reacted to the Commission's "carefully considered" ban as consonant with pressing national and state energy needs. Rehnquist thought it inappropriate to invalidate the ban particularly when only its "marginal applications" would infringe on First Amendment values.

In striking down the Public Service Commission's ban on bill inserts Justice Powell, who also authored this opinion, held that "the commission's prohibition of discussion on controversial issues strikes at the heart of the freedom to speak." As stressed in the Belloti case, speech as a protected means for informing the public does not depend on whether the source is a corporation, association, union, or individual. Powell wrote: "Where a government restricts the speech of a private person, the state action may be permitted only if the government can show that the regulation is serving a compelling state interest." Forced exposure to the utility company views on nuclear power might "offend the sensitivity of some customers" but "the ability of government to shut off discourse solely to protect others from hearing it" fell short of that substantial privacy interest worthy of protection by infringing on the First Amendment. Besides the Court contended that the customer "may escape exposure to objectionable material by transferring the bill insert from envelope to wastebasket." Powell summed it up for the Court majority: The advertising ban "is neither a valid time, place, or manner restriction, nor a permissible subject-matter regulation, nor a narrowly drawn prohibition justified by a compelling state interest."

Justices Blackmun and Rehnquist joined in a dissent that supported the Commission's attempt to protect ratepayers from "unwillingly financing the utility's speech." To preserve the billing envelope for the sole benefit of the paying customers was viewed not to infringe on the First Amendment rights of Consolidated Edison.

While the Court may not be of one mind about protecting commercial speech, the long standing insistance of the "commercial" as distinct from the "protected" has with Virginia Pharmacy and, in particular, Bellotti and the recent New York utility company cases blurred the distinction from clear focus.

II. The Business of the First Amendment Is to Assure Access to Information

Businessmen, workers, citizens, and in particular the public and the press have been getting mixed signals from the Supreme Court in recent years. In July 1979 the Court in Gannett v. DePasquale, 443 U.S. 368; Free Speech Yearbook: 1979, pp. 49-50, failed to distinguish itself with a 5-4 decision which seemed to say that if a defendant waived the Sixth Amendment right to a public criminal trial the press could not invoke this right. The Court majority declared that the "Constitution nowhere mentions any right of access to a criminal trial on the part of the public." The Court implied to some that judges could close not only pre-trial hearings, the Gannett situation, but the trial itself. Four of the justices went public to explain what they understood to be the limits of their thinking; but this clarified little as judges across the country in more than thirty trials, bolstered by what they thought the

Gannett decision meant, barred the press and the public.

Now the Supreme Court, justifiably embarrassed by the confusion that ensued from the Gannett case has in Richmond Newspapers, Inc. v. Virginia, 48 LW 5008, announced a broad right of access by the press to criminal trials and possibly other governmental proceedings as well. In the Richmond Newspapers case the judge later supported by the Virginia Supreme Court closed a murder trial to reporters. Unlike Gannett this case involved exclusion from the actual trial and was argued on First Amendment grounds. Like Gannett the Court could not settle on a single opinion as seven of the majority justices wrote six separate opinions. Nevertheless, this time they stressed similar points,and their thinking was articulated with sufficient clarity that the justices do not have to use the public platform to explain what they think each other meant.

Chief Justice Burger, joined by White and Stevens, wrote that American history presumes that American trials should be open and the First Amendment protects against the arbitrary closing of criminal trials. "The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access . . . could . . . be foreclosed arbitrarily," said Burger. Although the right to attend a criminal trial does not specifically appear in the Constitution, Burger equated it to the rights of privacy and travel which also are not mentioned but protected as indispensible.

The media during the past decade several times pressed the issue but found that on balance the asserted right to gather information was subordinated by the Court to other interests. Thus the significance of Justice Steven's comment in Richmond Newspapers that here we have a "watershed" case. Said Stevens, "Today for the first time, the court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press." Stevens noted that "never before has the court squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever."

The tone of agreement about the right to acquire newsworthy matter was not shared by all the justices. William Rehnquist contended in his dissent that the issue was not one of free press or fair trial but the exertion of power over the administration of justice in the states. Rehnquist could find nothing in the Constitution which prohibits a Virginia trial judge from administering his court in the manner chosen.

Although the newsgathering principle has been established by the Richmond Newspapers case, its constitutional extensions are uncertain and undiscoverable in this opinion. We do know that the Burger opinion left undisturbed the Gannett ruling that neither the press nor the public has a constitutional right to attend pre-trial proceedings. We also know that no justice held that the right to attend trials is absolute. In fact Burger noted that a trial judge may impose "reasonable restrictions on access" in the event of an "overriding interest" in such restrictions. The public as well as the press have reason for concern that Burger chose not to define "overriding interests."

The ramifications of the "access" right will not be known for several years. An optimistic projection would find reporters experiencing access to prisons, town meetings, and police blotters previously closed at times to public scrutiny and hence accountability. Indeed, access and all of its benefits and dimensions depends on how hard the future Court looks for "overriding interest." Justice Rehnquist has already demonstrated that he can find such in the right of the state to administer its own justice.

Other First Amendment opinions handed down by the Supreme Court during the 1979-1980 term resulted in rulings that:

1. door to door solicitation of funds is intertwined with persuasive speech; and although subject to local regulations, it is protected from an unconstitutional requirement that such solicitation be primarily for charitable purposes. (Village of Schaumburg v. Citizens for a Better Environment)

2. the use of a public nuisance statute to restrain the exhibition of allegedly obscene films violates First Amendment rights against prior restraint. (Carol Vance v. Universal Amusement Inc.)

3. the required submission of petitions for command approval prior to circulation on a military base violates neither the First Amendment nor a serviceman's right to communicate to a member of Congress. (Harold R. Brown v. Albert Glines)

4. it violates the First Amendment for a patronage appointee to be discharged soley on the basis of political party affiliation unless affiliation is a necessary requirement for effective job performance. (Branti v. Finkel)

5. to solicit signatures for a petition at a privately owned shopping center does not violate the property or First Amendment rights of the shopping center owner when the state guarantees this kind of free speech. (Pruneyard Shopping Center v. Robbins)

6. a state law which bans all picketing of residences but exempts "peaceful picketing of the place of employment involved in a labor dispute" is facially invalid discrimination among speech-related activities on the basis of content. (Carey v. Brown)

7. the screening of allegedly obscene films without a warrant violates the rights of film owners. (Walter v. U.S.)

III. Opinions Rendered

Village of Schaumburg v. Citizens for a Better Environment (48 LW 4162)

An Illinois not-for-profit corporation, Citzens for a Better Environment (CBE), was denied a permit to solicit contributions in the Village of Schaumburg because CBE could not demonstrate that 75 percent of its receipts would be used for charitable purposes as required by the Village. CBE sued the Village in Federal District Court claiming the 75 percent requirement violated CBE's constitutional rights by excluding solicitation expenses, salaries, and other administrative expenses which were necessary to support door-to-door distribution of literature and to provide answers to questions asked about environmental matters. The Village responded that CBE's primary objective was to raise funds for the benefit and salary of its employees and not for charitable purposes.

The Court of Appeals affirmed the lower court and concluded on behalf of CBE that the 75 percent requirement was unreasonable because it prohibited solicitations by "advocacy-oriented" organizations that depended on contributions to pay those who gathered and disseminated information in fulfillnent of CBE's purpose.

The Supreme Court affirmed the lower court and held this door-to-door solicitation of funds involved the communication of information and the advocacy of views, ideas, and causes protected by the First Amendment. Solicitation was deemed characteristically intertwined with informative and persuasive speech and without such information advocacy would cease. The claims of the Village that limitation on charitable solicitation is closely related to a substantial governmental interest in preventing fraud, protecting public safety, and assur-

ing residential privacy did not prevail over freedom of speech. The Village was referred to the use of laws to prevent fraud and trespass as less destructive of First Amendment rights.

Justice Rehnquist dissented because the ordinance, he claimed, dealt only with solicitation for financial contributions and properly enabled the Village to support only "truly charitable" organizations.

Carol Vance v. Universal Amusement Inc. (48 LW 4273)

The United States Court of Appeals for the Fifth Circuit declared unconstitutional a Texas nuisance abatement statute which could be interpreted to allow prohibiting a theatre which had shown allegedly obscene movies from future exhibition of such without judically determining obscenity and without a guarantee of prompt review of any preliminary finding of probably obscenity.

The Supreme Court with Justices Burger, Powell, White and Rehnquist dissenting upheld the appellate court and concluded that "the regulation of a communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance." The burden of enjoining a future exhibition of a film was found to be greater than the burden of acting against a past communication. Although the enforcement of a nuisance statute to achieve prior restraint came to the Court with a heavy presumption against its constitutional validity, the dissent found adequate procedural safeguards to protect First Amendment rights.

Harold R. Brown v. Albert Glines (48 LW 4095)

Before a petition can be circulated on an Air Force Base, regulations require approval of the base commander. Albert Glines was relieved of duty for distributing on an Air Force Base a petition about grooming standards. The petition to members of Congress and the Secretary of Defense was circulated without the required authorization. Glines challenged the validity of the regulation, and the lower court declared it facially invalid.

In a 5-3 decision delivered by Justice Powell the Supreme Court reversed the Court of Appeals by contending that such regulations protect respect for duty and discipline vital to military effectiveness, and on balance these essential attributes of an effective military force must prevail over free expression. Federal regulations protecting a serviceman's right to communicate with a member of Congress were not in conflict with the Air Force regulation since Congress only intended to assure that correspondence could be sent directly to an elected representative without going through official channels.

Justice Brennan's dissent stressed that the circulation of petitions "is indisputably protected First Amendment activity." The regulation challenged established discretionary censorship that arbitrarily deprived "precious communicative rights" and further failed to serve the military interests supposedly protected by this prior restraint. (See also, Secretary of the Navy v. Frank L. Huff, 48 LW 4122 for applicability to Navy and Marine Corps regulations)

Brauti v. Finkel (48 LW 4331)

Two Republican assistant public defenders brought suit against a Democrat, an appointed public defender, to prevent their discharge soley because they were Republicans. The issue presented was whether the First and Fourteenth Amendments permit job dismissals only because of potential beliefs. If the First Amendment protects a public employee in what he says, must it also protect him from discharge based on what he believes?

The Supreme Court in an opinion by Justice Stevens applied the First Amendment to protect the plaintiffs from being discharged where, as in this case, the job responsibilities could not be related to partisan political interests and to hold otherwise would enable "government power to prescribe what the

citizenry must accept as orthodox opinion." Justice Brennan found the reason for the dismissals to constitute an unconstitutional condition on the receipt of a public benefit. The case came within the rule in Perry v. Sindermann, 498 U.S. 593, that "an employee with no contractual right to retain his job cannot be dismissed for engaging in constitutionally protected speech."

Justices Powell and Rehnquist in dissent took the position that the constitutionality of appointments to public office based on political affiliation depends upon the government interest served by the patronage. According to the dissent certain patronage practices such as building stable political parties further important interests which justify limiting First Amendment rights.

Pruneyard Shopping Center v. Robins (48 LW 4650)

Michael Robins, on the premises of privately owned Pruneyard Shopping Center, solicited signatures for a petition opposing a United Nations resolution against Zionism. A Pruneyard security guard asked Robins to move to a public sidewalk. Robins immediately left the premises and later sued in a California state court claiming that the California constitution protects the reasonable exercise of speech and petition in privately owned shopping centers. The California Supreme Court reversed lower courts and found for Robins.

The issue certified to the U.S. Supreme Court was "whether state constitutional provisions, which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, violate the shopping center owner's property rights under the Fifth and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments."

Justice Rehnquist delivered the opinion which without dissent affirmed the California Supreme Court finding for Robins. Rehnquist noted that although the Court had previously held that "property does not lose its private character merely because the public is generally invited to use it for designated purposes," such a finding was not made where, as here, a state constitution provided for the use of private property by strangers. Further, Pruneyard's value and use of their property will not be impaired; and they may still restrict expressive activity by time, place, and manner regulations that protect the center's commercial functions. In response to Pruneyard's contention that a private property owner has a First Amendment right not to be forced to use his property as a forum for the speech of others the Court held that views expressed through pamphlet distribution or petition circulation "will not likely be identified with those of the owner" who, also could disavow any connection with the message by posting signs near Robins' activity explaining that he is communicating his own message as provided by state law.

Carey v. Brown (48 LW 4756)

Brown, who picketed the home of the Mayor of Chicago, was convicted in an Illinois court for violating a statute prohibiting picketing of residences or dwellings other than for peaceful picketing of a place of employment involved in a labor dispute. Brown claimed that the statute was constitutionally invalid on its face for violating the equal protection clause of the Fourteenth Amendment.

The Supreme Court supported Brown's claim since the statute made an impermissible distinction between peaceful labor picketing and other peaceful picketing. The Court noted that the statute regulates expressive conduct within the First Amendment's preserve and to exempt labor picketing from prohibition improperly discriminates lawful from unlawful conduct on the basis of a demonstrator's communication. The exclusion of labor picketing from prohibited conduct could not be upheld as a means of protecting residential privacy because nothing in the "content-based labor-nonlabor distinction" has any bearing on privacy.

Justices Rehnquist, Burger, and Blackmun in dissent found no objection to regulation based on message content if closely related to a permissible state purpose.

Walter v. U.S. (48 LW 4807)

An interstate shipment of sealed packages containing movie films depicting homosexual activities was mistakenly delivered to a party other than the consignee. The film was turned over to FBI agents who viewed the film without first obtaining a warrant or communicating with the consignor or consignee. Walter was indicated and convicted on federal obscenity charges for interstate shipment of the films.

The Supreme Court reversed the conviction by concluding that the unauthorized screening of the films invaded a protected privacy interest. There was, therefore, a search without a warrant or consent. Lawful possession of the film by the FBI did not carry with it authority to search the contents of a package "arguably protected by the First Amendment." The Court held that seizure based on disapproval of the message contained in that seized makes it especially important that the warrant requirement of the Fourth Amendment be rigidly applied.

Justices Blackmun, Burger, Powell, and Rehnquist dissented because of their belief that by the time the FBI received the films no expectation of privacy in their contents remained.

IV. Docketed: Other Cases Disposed

The Supreme Court took action that in each of the following cases resulted in allowing the holding of the lower court to prevail except for two cases in which the judgment was reversed in one and vacated in the other.

Advertising

Ruling below: The First Amendment is not violated by a state statute which in the interest of traffic safety bans signs with political messages while exempting from its ban certain commercial advertising. Issues: Does preference to commercial over political speech violate free speech rights? Does a statute which prohibits speech based on its content rather than place or manner of communication violate the First Amendment? (Appeal dismissed. Lotze v. Washington, 593 P2d 811, 48 LW 3250).

Public Utilities

Ruling Below: A ban on promotional advertising violated the First Amendment. Issue: Is truthful promotional advertising designed to inform consumers of the benefits of space heating protected from prohibition by a public utility commission? (Certiorari denied. Long Island Lighting Co. v. New York State Public Service Commission, 48 LW 3379).

Trade Regulation

Issues: Does it violate the First Amendment for the Federal Trade Commission to require a publisher to include specific affirmative statements in its sales communications even though unnecessary to prevent deception? The lower court found no undue restriction on commercial speech because forced disclosure of a sales purpose was the "least restrictive remedy that will adequately further legitimate government interest." (Certiorari denied. Encyclopaedia Britannica, Inc. v. FTC, 48 LW 3409).

Ruling below: A state regulation which punishes advertisers who negligently disseminate untruthful or misleading advertising does not violate the First Amendment. Issue: Does First Amendment protection of commercial speech prohibit penalty for false or misleading advertising or, at the least, must the state show that the advertiser knew of the falsity of the advertisement or published with reckless disregard for such? (Certiorari denied. Olson v.

Superior Court of California, 48 LW 3620).

Newspapers

Ruling below: A newspaper does not violate the First Amendment by refusing to publish an advertisement that contains abbreviations. A newspaper has a right to refuse advertising or condition its acceptance. Issue: If a newspaper belongs to a combination which monopolizes trade in their area, does it acquire an obligation to provide advertiser access, and can it decline without offering a rational reason? (Certiorari denied. Galbreath v. Newspaper Printing Corp., 580 SW2d 777, 48 LW 3182).

Schools

Ruling below: The suspension of high school students for off-campus distribution of an obscene magazine violates the First Amendment. Issues: May a public school punish students for on-campus activity which results in the off-campus sale of an allegedly obscene or indecent underground newspaper? Does the requirement of Tinker v. Des Moines, 393 U.S. 503 (1969), that actual disruption of the educational process must be proved, apply where speech is indecent? Must a public school make its facilities available for publication and storage of possible obscene materials? (Certiorari denied. Granville Central School District v. Thomas, 48 LW 3511).

Ruling below: A professor at a state university who demonstrated on campus in protest against the Cambodian invasion and the Kent State University killings was not denied his First Amendment rights to speech and assembly when he was dismissed for conduct violating a university code but not on grounds related to the substance of his remarks. The code permitted remarks to be considered only when they "raise grave doubts concerning his fitness for his position." Issue: Do university regents or the state courts permissibly construe a university code; and, if the regents, is their construction binding when made years after "extramural utterances" took place? (Certiorari denied. Adamian v. Lombardi, 608 F2d 1224, LW 3703).

Elections

Issue: Does a California Political Reform Act that prohibits lobbyists from making campaign contributions to state candidates or elected officials violate free assciation? This appeal resulted from a lower court finding that the Act in this respect violated the First Amendment. (Certiorari denied. California Fair Political Practices Commission v. Institute of Governmental Advocates, 48 LW 3419).

State Regulation

Issue: Does statute-endorsed inquiry by a state into an individual's political association and beliefs deny First Amendment rights when there is no showing that such disclosure interferes with First Amendment freedoms? (Certiorari denied. Cahill v. Governmental Ethics Commission, 48 LW 3278).

Ruling below: The Indiana Supreme Court upheld an Indiana statute as not being unconstitutionally vague for failing to define a "public place" in a law prohibiting certain conduct or nudity in a public place. Also the statute is not unconstitutionally overbroad since the rights claimed depend on a determination that they are properly First Amendment rights and "appearing nude is conduct, not speech, and as such does not come within protection of the First Amendment." Issue: Does a statute which prohibits appearing nude in a "public place" conflict with protected free speech under the First Amendment? (Apppeal dismissed. Clark v. Indiana, 397 NE2d 50, 48 LW 3668).

Ruling below: A state statute which prohibited verbal interference with activities on state property and give discretion to law enforcement officials to determine the potential for disruption of normal activities does not violate

First and Fourteenth Amendment guarantees. Issue: Is a broad statute which renders unlawful speech-related conduct on state property in violation of the First Amendment for punishing free speech and assembly? (Certiorari denied. Boone v. Georgia, 48 LW 3121).

Government Personnel

Facts: Frank Snepp entered into an agreement with the C.I.A. that as a condition of employment he would submit for publication review any information intended for publication about the Agency. Snepp breached this agreement with a book about C.I.A. activities in Viet Nam. The government conceded that the book contained no classified, non-public material. Ruling below: The purpose of the employment agreement was to assure that classified, non-public information is not to be disclosed without Agency approval rather than to give the C.I.A. power to censor the critical speech of employees. Issue: Does an agreement not to publish classified information imply an obligation to submit unclassified information for prepublication review? Held: There was a constructive trust between Snepp and the C.I.A. protecting both from unwarranted risks. Since Snepp published unreviewed material in violation of his contract, he must be required to forfeit any benefits derived from this branch of fiduciary relationship. The Court of Appeals failed to impose a constructive trust on Snepp's profits. (Judgment reversed. Snepp v. U.S., 48 LW 3527).

Obscenity

Issue: Does an Ohio obscenity statute which exempts motion picture projectionists from prosecution but permits such of bookstore clerks and cashiers deny equal protection under the Fourteenth Amendment? Since neither has a financial stake in their place of employment nor managerial responsibility for its operation, should they be treated alike? (Appeal dismissed. Ricco v. Ohio, 48 LW 3587).

Ruling below: A state law which permits, without an initial judicial determination of obscenity, restraint by removing materials from a place where allegedly a moral nuisance exists and provides summary contempt punishment for violation of any injunction issued in accord with the restraint constitutes unconstitutional prior restraint. Issue: Is the law a prior restraint on material protected by the First Amendment or a constitutional method by which to control legitimately obscene material? (Certiorari denied. Brockett v. Spokane Arcades, Inc., 48 LW 3294).

Issues: 1. Does the government commit illegal prior restraint by seizing and holding presumptively protected First Amendment material for over two years without obtaining a judicial determination of obscenity? 2. Does seizure of films and subsequent viewing for over two months constitute an illegal search under the Fourth Amendment? 3. Is it error for a trial judge to fail to inform the jury that children are not to be considered in determining the community standard for obscenity? 4. When the defendant stipulates that films are obscene, is the court then required to accept this stipulation and thereby keep the jury from viewing the film? (Judgment vacated. Grassi v. U.S., 602 F2d 1192, 48 LW 3440).

Criminal Procedure

Ruling below: The defendant during a speech challenging the constitutionality of federal income tax laws induced taxpayers to avoid taxes in violation of U.S. law. The First Amendment "does not protect speech that goes beyond the call for tax reform" Issue: Does the First Amendment allow criminal prosecution "for pure speech in a situation in which public speech is unaccompanied by any acts whatsoever"? (Certiorari denied. Moss v. U.S., 48 LW 3340).

Issue: Does closure to press and public of a pretrial hearing involving a new state-juvenile-offender law violate the First Amendment by depriving the press and public of their right to know how this controversial law is working? (Certiorari denied. Merola v. Bell, 48 LW 3294).

Issue: May the press and public "be excluded from [a] pretrial suppression hearing in [a] situation in which counsel for [the] press makes timely objection, the prosecutor opposes closure, the trial court finds that publicity has been moderate, the record supports that finding, and the county of venue has a population in excess of one million"? (Certiorari denied. New York News Inc. v. Bell, 48 LW 3326).

FREEDOM OF SPEECH BIBLIOGRAPHY:
JULY 1979--JUNE 1980
ARTICLES, BOOKS, NEWSLETTERS, COURT CASES

David Eshelman
Central Missouri State University

(This bibliography is generally limited to materials published between July 1979 and June 1980. Bibliographies for previous years appear in earlier issues of the Free Speech Yearbook.)

Articles

"Nuisance-Abatement Statute that, When Applied to Obscenity, Authorizes a Prior Restraint on the Future Exhibition of Unnamed Films, Violates the United States Constitution." Georgia Law Review, 13:1076-85 (Spring 1979).

Abrams, F. "The Press is Different: Reflections on Justice Stewart and the Autonomous Press." Hofstra Law Review, 7:559-720 (Spring 1979).

"Access to State-Owned Communications Media--the Public Forum Doctrine." U.C.L.A. Law Review, 26:1410-61 (August 1979).

Anastaplo, G. "Selected Bibliography on Pornography and Violance: Human Nature and the First Amendment." University of Pittsburgh Law Review, 40:517-778 (Summer 1979).

"Applicability of the Constitutional Privilege to Defame: Question of Law or Question of Fact?" Indiana Law Journal, 55:389-406 (Winter 1980).

"Applicability of the Fairness Doctrine to Ordinary Product Advertisements: National Citizens Committee for Broadcasting v. FCC (565 F 2d 1095)." Boston College Law Review, 20:425-38 (January 1979).

Ashdown, G. G. "Editorial Privilege and Freedom of the Press: Herbert v. Lando (99 Supreme Court 1635)." University of Colorado Law Review, 51:303-39 (Spring 1980).

Atkey, R. G. "Freedom of Information: The Problem of Confidentiality in the Administrative Process." University of Western Ontario Law Review, 18:153-84 (Winter 1980).

"Attorney 'No-Comment' Rules and the First Amendment." Arizona Law Review, 21:61-84 (1979).

"Attorney Solicitation of Clients: Proposed Solutions." Hofstra Law Review, 7:755-79 (Spring 1979).

Baier, K. "The Liberal Approach to Pornography." University of Pittsburgh Law Review, 40:517-778 (Summer 1979).

Barron, J. A. "First Amendment: A Symposium." An Introduction. Kentucky Law Journal, 67:775-965 (1978-1979).

"Bates v. State Bar of Arizona (97 Supreme Court 2691) the First Amendment Right of Attorney Advertisement of Routine Legal Service Fees." Texas Southern University Law Review, 5:198-206 (1978).

Bazelon, D.L. "First Amendment and the 'New Media'--New Directions in Regulating Telecommunications." Federal Communications Law Journal, 31:201-13 (Spring 1979).

"Bellotti (First National Bank of Boston v. Bellotti 98 Supreme Court 1407)--Corporations' Freedom of Speech." Louisiana Law Review, 39:1225-39 (Summer 1979).

Bevan, V. T. "Protest and Public Order." Public Law, 1979:163-87 (Summer 1979).

BeVier, L. R. "Informed Public, an Informing Press: The Search for a Constitutional Principle." California Law Review, 68:482-517 (May 1980).

Bezanson, R.P. "Symposium: Toward a Resolution of the Expanding Conflict Between the Press and Privacy Interests. Public Disclosures as News: Injunctive Relief and Newsworthiness in Privacy Actions Involving the Press." Iowa Law Review, 64:1061-283 (July 1979).

"Big Brother's War on Television Advertising: How Extensive is the Regulatory Authority of the Federal Trade Commission?" Southwestern Law Journal, 33:683-701 (June 1979).

"Billing Records Disclosing Journalists' Confidential Sources." Villanova Law Review, 24:786-99 (May 1979).

Bird, R.E. "Role of the Press in a First Amendment Society." Santa Clara Law, 20:1-12 (Winter 1980).

Blanchard, M.A. "Institutional Press and its First Amendment Privileges." Supreme Court Review, 1978:225-96 (1978).

Blubaugh, R. (Special Issue on Media and the Law) "California's Constitution: The Reporter's Forgotten Ally." Journal of the Bar of California, 55:12-37 (January 1980).

Bogen, D.S. "Balancing Freedom of Speech." Maryland Law Review, 38:387-479 (1979).

Bonnicksen, A. L. "Obscenity Reconsidered: Bringing Broadcasting into the Mainstream Commentary." Valparaiso University Law Review, 14:261-93 (Winter 1980).

Borow, R. H. and H. E. Kruth "Closed Preliminary Hearings: The Constitutionality of Penal Code Section 868 in the Aftermath of Gannett v. De Pasquale (99 Supreme Court 2898)." Journal of the State Bar of California, 55:12-37 (January 1980).

Brennan, W. J. Jr. "Address." Rutgers Law Review, 32:173-83 (July 1979).

Brennan, William J. "Why Protect the Press?" Columbia Journalism Review, XVIII:5 (January/February 1980) 59-62.

Briod, Andre E. "Herbert v. Lando: Threat to the Press, or Boomerang for Public Officials?" Communications and the Law, 2:2 (Spring 1980) 59-92.

"Broadcasting Indecent But Not Obscene Language--When the FCC Finds that a Pig Has Entered the Parlor During Times of the Day When Children are in the Audience, the Exercise of its Regulatory Power Does Not Depend on Proof that the Pig is Obscene." Journal of Urban Law, 57:95-121 (Fall 1979).

Brotman, Stuart N. "Judicial Review of the FCC: The Developing Legacy of Greater Boston." Journal of Communication, 30:31-36 (Winter 1980).

Brownmiller, S. "Pornography and the First Amendment." New York Review of Law and Social Change, 8:181-300 (1978-1979).

Buchanan, A. "Autonomy and Categories of Expression: A Reply to Professor Scanlon." University of Pittsburgh Law Review, 40:517-778 (Summer 1979).

Burrows, J. F. "Law and the Press." Otago Law Review, 4:119-32 (1978).

"Can't Get Enough of that Sugar Crisp: The First Amendment Right to Advertise to Children." New York University Law Review, 54:561-600 (July 1979).

"Case For a Speech or Debate Privilege For State Legislators in Federal Courts." Valparaiso University Law Review, 13:501-34 (Spring 1979).

Cass, R.A. "First Amendment Access of Government Facilities." Virginia Law Review, 65:1287-355 (November 1979).

"Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents." Harvard Civil Rights-Civil Liberties Law Review, 14:485-528 (Summer 1979).

Chamberlin, Bill F. "The FCC and the First Principle of the Fairness Doctrine: A History of Neglect and Distortion." Federal Communications Bar Journal, 31:361-412 (Fall 1979).

"Charitable Exemption and Voter Education: The Statute and the Constitution." The Tax Lawyer, 32:795-807 (Spring 1979).

"Church Lobbying: The Legitimacy of the Controls" Houston Law Review, 16:480-535 (1979).

Cohen, S.A. "Freedom of Information and the Official Secrets Act." McGill Law Journal, 25:99-110 (1979).

"Commercial Speech and the Limits of Legal Advertising." Oregon Law Review, 58:193-219 (1979).

"Communications Law: The Decline of Press Privilege." Washburn Law Journal, 19:54-75 (Fall 1979).

"Constitutional Law--F.C.C. Regulations Prospectively Barring Formation or Transfer of Colocated Newspaper-Broadcast Combinations Do Not Violate the First Amendment Rights of Newspaper-Broadcast Owners." Howard Law Journal, 22:527-37 (1979).

"Constitutional Law: First Amendment--Freedom of the Press--Erosion of New York Times Co. v. Sullivan." Akron Law Review, 13:373-89 (Fall 1979).

"Constitutional Law--First and Fourth Amendments--Search Warrants and the New Media." Wisconsin Law Review, 1979:660-82 (1979).

"Constitutional Law--Freedom of Speech--Federal Communications Commission Sanctions Against a Radio Station that Broadcasts Language the Commission Finds 'Indecent', Although Not 'Obscene' Do Not Violate the First Amendment." Hofstra Law Review, 7:781-803 (Spring 1979).

"Constitutional Law--Freedom of Speech and of the Press-Prohibition of Publication of Juveniles' Names Declared Unconstitutional." North Dakota Law Review, 56:279-87 (1980).

"Constitutional Law--Freedom of the Press and a Reporter's Ability to Gather News." Wayne Law Review, 26:75-95 (November 1979).

"Constitutional Law--Municipal Regulation of Commercial Handbilling." Memphis State University Law Review, 9:661-70 (Summer 1979).

"Constitutional Law--Sixth Amendment Takes Precedence Over Newsman's Statutory Shield." Suffolk University Law Review, 13:1119-34 (Summer 1979).

"Constitutional Law--The Fine Line Between Protected and Nonprotected Speech." Florida State University Law Review, 7:749-57 (Fall 1979).

"Constitutional Revolution in the Law of Libel: New York Times and Gertz Applied." Texas Law Review, 11:611-36 (Spring 1980).

"Constitutionality of Congressional Legislation to Overrule Zurcher v. Stanford Daily (98 Supreme Court 1970)." Journal of Criminal Law, Criminology and Police Science, 71:147-62 (Summer 1980).

"Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns." Harvard Law Review, 93:535-63 (January 1980).

"Copyright Infringement and the First Amendment." Columbia Law Review, 79:320-40 (March 1979).

"Copyright Protection For Live Sports Broadcasts: New Statutory Weapons With Constitutional Problems." Federal Communications Law Journal, 31:277-301 (Spring 1979).

"Corporate Advocacy Advertising: When Business' Right to Speak Threatens the Administration of Justice." Detroit College of Law Review, 1979:623-75 (Winter 1979).

"Corporate Identity of Speaker Does Not Deprive Corporate Speech of its Entitlement to First Amendment Protection." Emory Law Journal, 28:183-214 (Winter 1979).

"Corrective Advertising and the Limits of Virginia Pharmacy." Stanford Law Review, 32:121-42 (November 1979).

Coulson, David C. "Antitrust Law and the Media, Making the Newspapers Safe for Democracy." Journalism Quarterly, 57:1 (Spring 1980).

Cowen, Z. "Press, the Courts, and the Law." Melbourne University Law Review, 12:1-18 (June 1979).

Craig, R. Stephen "Cameras in Courtrooms in Florida." Journalism Quarterly, 56:4 (Winter 1979) 703-710.

"Criminals-turned-authors: Victims' Rights v. Freedom of Speech." Indiana Law Journal, 54:443-65 (Spring 1979).

"Culver v. Secretary of the Air Force (559 F 2d 622): Demonstrations, the Military, and the First Amendment." Military Law Review, 84:91-115 (Spring 1979).

Dale, F. I. and M. W. Dale "Full Court Press: The Imperial Judiacy vs. the Paranoid Press." Pepperdine Law Review, 7:241-311 (Winter 1980).

Dall'Osto, R. M. "Is the First Amendment Still in Danger?" Human Rights, 8:14-19+ (Fall 1979).

Danon, N.Y. "Illinois Supreme Court and the Appellate Court Decisions Regarding Prior Restraint in Skokie v. The American Nazi Part (Ill) (373 N E 2d 21)." Illinois Bar Journal, 67:540-9+ (May 1979).

"Defamation and the First Amendment in the 1978 Term: Diminishing Protection for the Media." University of Cincinnati Law Review, 48:1027-45 (1979).

"Defamation Plaintiffs May Inquire into Editorial Process to Establish 'Actual Malice' Under New York Times." Suffolk University Law Review, 14:31-47 (Winter 1980).

"Delinquency Hearings and the First Amendment: Reassessing Juvenile Court Confidentiality Upon the Demise of 'Conditional Access'." University of California Davis Law Review, 13:123-73 (Winter 1979-1980).

Denicola, R.C. "Copyright and Free Speech: Constitutional Limitations on the Protection of Expression." California Law Review, 67:283-316 (March 1979).

"Developments Under the Freedom of Information Act--1979." Duke Law Journal, 1980:139-69 (February 1980).

Diamond, P. "Interference With the Rights of Others: Authority to Restrict Students' First Amendment Rights." Journal of Law and Education, 8:347-58 (July 1979).

"Discovery and the First Amendment." William and Mary Law Review, 21:331-55 (Fall 1979).

Duffy, P.J. "Sunday Times Case [Judgment of April 26, 1979 (European Court of Human Rights)]: Freedom of Expression, Contempt of Court and the European Convention on Human Rights." Human Rights Review, 5:17-53 (Spring 1980).

Dworkin, A. "Pornography: The New Terorism." New York Review of Law and Social Change, 8:181-300 (1978-1979).

"Edwards v. National Audubon Society, Inc. (556 F 2d 113): The Right to Print Known Falsehoods." University of Illinois Law Forum, 1979:943-68 (1979).

Elder, D. A. "Law of Defamation and Constitutional Privilege: A Contextual Analysis of Oklahoma Law in Light of Gertz v. Robert Welch. Inc. Through Hutchinson v. Proxmire (99 Supreme Court 2675)." Oklahoma City University Law Review, 4:17-87 (Fall 1979).

Ellis, D. C. Jr. "Damages and the Privacy Tort: Sketching a 'Legal Profile'." Iowa Law Review, 64:1061-283 (July 1979).

Emerson, T. I. "First Amendment Doctrine and the Burger Court." California Law Review, 68:422-81 (May 1980).

Emerson, T.I. "Right of Privacy and Freedom of the Press." Harvard Civil Rights-Civil Liberties Law Review, 14:329-60 (Summer 1979).

Erickson, W. H. "First Amendment Limitations on the Confidentiality of Lawyer Disciplinary and Disability Proceedings." Kentucky Law Journal, 67:775-965 (1978-1979).

Errera, R. "Right of Access to Government Documents--The Reform of the Law in France." Human Rights Review, 4:180-92 (Autumn 1979).

"Evidentiary Use of a Criminal Defendant's Reading Habits and Political Conversations." Harvard Law Review, 93:419-29 (December 1979).

"Examination of the Theories Justifying Content Regulation of the Electronic Media." Syracuse Law Review, 30:871-92 (Summer 1979).

Fahringer, H.P. "First Amendment Constraints on Legal Regulation. 'If the Trumpet Sounds An Uncertain Note. . .'." New York Review of Law and Social Change, 8:181-300 (1978-1979).

"Fair Trial v. Unfair Advertising: Jury Award Advertising and the First Amendment." Fordham Law Review, 48:1309-31 (May 1980).

"Fallacy of Farber [Farber, In re (NJ) 394 A 2d 330]: Failure to Acknowledge the Constitutional Newsman's Privilege in Criminal Cases." Journal of Criminal Law, Criminology and Police Science, 70:299-336 (Fall 1979).

Farber, D. A. "Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of Cohen v. California." Duke Law Journal, 1980:283-303 (April 1980).

Farber, D. A. "Commercial Speech and First Amendment Theory." Northwestern University Law Review, 74:372-408 (October 1979).

Farber, D.A. "Content Regulation and the First Amendment: A Revisionist View." Georgetown Law Journal, 68:727-63 (Fall 1980).

"FCC Regulation of Broadcast News: First Amendment Perils of Conflicting Standards of Review." Fordham Law Review, 48:1226-50 (May 1980).

"FCC Regulation of Indecent Speech." New York Law School Law Review, 25:347-76 (1979).

"FCC v. Pacifica Foundation (98 Supreme Court 3026): An Indecent (Speech) Decision? (George Carlin's 'Filthy Words')" Ohio State Law Journal, 40:155-85 (1979).

"Federal Election Commission: The First Amendment and Due Process." Yale Law Journal, 89:1199-224 (May 1980).

"Federal Legislative Proposals for the Protection of Privacy." Fordham Urban Law Journal, 8:773-817 (1979-1980).

Feinberg, J. "Pornography and the Criminal Law." University of Pittsburgh Law Review, 40:517-778 (Summer 1979).

Felcher, P.L. and E.L. Rubin "Privacy, Publicity, and the Portrayal of Real People by the Media." Yale Law Journal, 88:1577-622 (July 1979).

Ferguson, J.R. "Scientific Inquiry and the First Amendment." Cornell Law Review, 64:639-65 (April 1979).

"Fighting Words Doctrine--Is There a Clear and Present Danger to the Standard?" Dickinson Law Review, 84:75-96 (Fall 1979).

"'Filthy Words': One Man's Lyric or Broadcasting's Indecency?" University of Miami Law Review, 34:147-59 (November 1979).

Firmage, E.B. and K. Christenson "Speech and Campaign Reform: Congress, the Courts and Community." Georgia Law Review, 14:195-238 (Winter 1980).

"First Amendment and Physician Advertising After Bates (Bates & O'Steen v. State Bar of Arizona 97 Supreme Court 2691)." The Forum, 14:938-61 (Spring 1979).

"First Amendment Constraints on Reform of the Federal Regulation of Lobbying Act." Texas Law Review, 57:1219-57 (October 1979).

"First Amendment Interest Balancing--Behind Bars?" University of Miami Law Review, 33:680-91 (March 1979).

"First Amendment Mailing Rights of Parolees and Prison Inmates: A Higher Standard of Judicial Protection." University of San Francisco Law Review, 13:913-44 (Summer 1979).

"First Amendment Newsman's Privilege From Branzburg to Farber (Farber, In re (NJ) 394 A 2d 330)." Seton Hall Law Review, 10:333-68 (1979).

"First Amendment Protection for Commercial Speech: An Optical Illusion?" University of Florida Law Review, 31:799-814 (Summer 1979).

"First Amendment Right to Disseminate Discovery Materials." Harvard Law Review, 92:1550-60 (May) 1979).

"First Amendment Right to Gather State-Held Information." Yale Law Journal, 89:923-39 (April 1980).

"First Amendment Rights of Newspaper are Adequately Protected by Search Warrant Requirement." University of Kansas Law Review, 27:653-62 (Summer 1979).

"First Amendment Rights of Prison Newspaper Editors." Virginia Law Review, 65:1485-98 (December 1979).

"First Amendment Standards for Subsequent Punishment of Dissemination of Confidential Government Information." California Law Review, 68:83-105 (January 1980).

"First and Fourth Amendments Do Not Prohibit Use of Search Warrants Against Newspapers." Tulane Law Review, 53:1513-23 (June 1979).

"First National Bank of Boston v. Bellotti (98 Supreme Court 1407): The Constitution Guarantees Free Speech for Corporations." Detroit College of Law Review, 1979:545-60 (Fall 1979).

"First National Bank of Boston v. Bellotti (98 Supreme Court 1407): Corporate Political Speech in Ballot-Measure Campaigns." New York Review of Law and Social Change, 8:63-86 (1978-1979).

"First National Bank of Boston v. Bellotti (98 Supreme Court 1407): First Amendment Protection for Corporate Speech." University of Missouri at Kansas City Law Review, 48:96-107 (Fall 1979).

"First National Bank of Boston v. Bellotti (98 Supreme Court 1407): The Reopening of the Corporate Mouth--The Corporation's Right to Free Speech." Arizona Law Review, 21:841-69 (1979).

Fischer, J.M. "Confidentiality and the Press: Tales of the Confessional." Journal of the State Bar of California, 55:12-37 (January 1980).

Francois, William E. "Copyright Law and Videotaping of TV Programs for Classroom Use." Journalism Quarterly, 57:1 (Spring 1980) 5-9.

Franklin, M. A. "Herbert v. Lando (99 Supreme Court 1635) Reflections on Herbert v. Lando." Stanford Law Review, 31:1035-67 (July 1979).

"Free Press and Its Territorial Limitations: United States Correspondence in the Soviet Courts." Brooklyn Journal of International Law 5:348-78 (Summer 1979).

"Free Speech and Impermissible Motive in the Dismissal of Public Employees." Yale Law Journal, 89:376-98 (December 1979).

"Free Speech and Public Utilities: Consolidated Edison Co. v. Public Service Commission [(NY) 390 N E 2d 749]." Albany Law Review, 44:515-31 (February 1980).

"Freedom of Expression-When May the Government Regulate the Public Expression of Ideas?" Loyola Law Review, 25:395-405 (Spring 1979).

"Freedom of Nonfree Information: An Economic Proposal For Government Disclosure of Privately Submitted Commercial Information." Stanford Law Review, 32:339-72 (January 1980).

"Freedom of Speech: Discovery-Constitutional Standards Governing Issuance of Protective Orders Pursuant to Fed. R. Civ. P. 26(c) When Freedom of Speech is Restrained." Temple Law Quarterly, 52:1197-220 (1979).

"Freedom of Speech or of the Press: The Broadcaster as Citizen and Institution." Journal of Contemporary Law, 5:339-59 (Spring 1979).

"[illegible]eeing Public Broadcasting From Unconstitutional Restraints." Yale Law Journal, 89:719-47 (March 1980).

Friedenthal, J.H. "Herbert v. Lando (99 Supreme Court 1635): A Note on Discovery." Stanford Law Review, 31:1035-67 (July 1979).

Fritz, L. "Pornography as Gynocidal Propaganda." New York Review of Law and Social Change, 8:181-300 (1978-1979).

"From Dartmouth College to Bellotti (First National Bank of Boston v. Bellotti, 98 Supreme Court 1407): The Political Career of the American Business Corporation." Ohio North Law Review, 6:392-430 (April 1979).

Gard, S.W. "Absoluteness of the First Amendment." Nebraska Law Review, 58:1053-86 (1979).

Gard, S.W. "Impact of Pacifica Foundation [FCC v. Pacifica Foundation (98 Supreme Court 3026)] On Two Traditions of Freedom of Expression." Cleveland State Law Review, 27:465-503 (1978).

Garvey, J. H. "Children and the First Amendment." Texas Law Review, 57:321-79 (February 1979).

Geller, H. "First Amendment and Electronic Media: Raising the Issues." Black Law Journal, 5:353-68 (1977).

Gerety, T. "Pornography and Violence." University of Pittsburgh Law Review, 40:517-778 (Summer 1979).

Glasser, Theodore L. and Harvey Jassem "Indecent Broadcasts and the Listener's Right of Privacy." Journal of Broadcasting, 24:3 (Summer 1980) 285-300.

Gottlieb, S.E. "Government Allocation of First Amendment Resources." University of Pittsburgh Law Review, 41:205-49 (Winter 1980).

"Government Referendum Advocacy: An Emerging Free Speech Problem." Case Western Reserve Law Review, 29:886-912 (Summer 1979).

"Government Secrecy Agreements and the First Amendment." American University Law Review, 28:395-426 (Spring 1979).

Green, C. "Press and the Judicial System: One Reporter's View." American Criminal Law Review, 16:497-502 (Spring 1979).

Gurfein, M.I. "Law and the Press." New York State Bar Journal, 51:170-3+ (April 1979).

Hall, G. G. "Identifying Disorderly or Offensive Conduct: The Scope of Judicial Discretion Under Section 3D of the Police Offences Act 1927." Otago Law Review, 4:217-44 (1978).

Hart, G. "Corporate Spending on State and Local Referendums: First National Bank of Boston v. Bellotti (98 Supreme Court 1407)." Case Western Reserve Law Review, 29:808-29 (Summer 1979).

Heller, F. H. "The End of the 'Commercial Speech' Exception--Good Riddance or More Headaches For the Courts?" Kentucky Law Journal, 67:775-965 (1978-1979).

"Herbert v. Lando (99 Supreme Court 1635): The Defamation Plaintiff's Burden of Proof and His Access to the Editorial Process." Capital University Law Review, 9:97-112 (1979).

Hommel, T. "Effects of Violent Pornography: The Scope of the Problem--Images of Women in Pornography and Media." New York Review of Law and Social Change, 8:181-300 (1978-1979).

Horowitz, I. L. and V. C. Bramson "Skokie, the ACLU and the Endurance of Democratic Theory." Law and Contemporary Problems, 43:328-48 (Spring 1979).

Hunter, Ho. O. "Editorial Privilege and the Scope of Discovery in Sullivan-rule Libel Actions." Kentucky Law Journal, 67:775-965 (1978-1979).

"In re Primus (98 Supreme Court 1893) and Ohralik v. Ohio State Bar Association (98 Supreme Court 1912): A First Amendment Challenge to Prohibitions on Attorney Solicitation." University of Cincinnati Law Review, 48:886-99 (1979).

Ingber, S. "Defamation: A Conflict Between Reason and Decency." Virginia Law Review, 65:785-858 (June 1979).

Jackson, T. H. and J. C. Jeffries, Jr. "Commercial Speech: Economic Due Process and the First Amendment." Virginia Law Review, 65:1-41 (February 1979).

"Journalist's Privilege: In re Farber [(NJ) 394 A 2d 330] and the New Jersey Shield Law." Rutgers Law Review, 32:545-76 (September 1979).

"Judicial Restrictions on Attorney's Speech Concerning Pending Litigation: Reconciling the Rights to Fair Trial and Freedom of Speech." Vanderbilt Law Review, 33:499-516 (March 1980).

Kamenshine, R. D. "First Amendment's Implied Political Establishment Clause." California Law Review, 67:1104-53 (September 1979).

"Keeping the Airwaves Safe for 'Indecency'." De Paul Law Review, 27:155-73 (Fall 1977).

Lacey, Linda Jo "The Electric Church: An FCC - 'Established' Institution?" Federal Communications Law Journal, 31:235-275 (Spring 1979).

Lascher, E. L. "A Lawyer's Response." Journal of the State Bar of California, 55:12-37 (January 1980).

"Lawyer Solicitation: The Effect of Ohralik (Ohralik v. Ohio State Bar Association 98 Supreme Court 1912) and Primus (Primus, In re, 98 Supreme Court 1893)." Suffolk University Law Review, 13:960-79 (Summer 1979).

Lee, W. E. "Antitrust Enforcement, Freedom of the Press, and the 'Open Market': The Supreme Court on the Structure and Conduct of Mass Media." Vanderbilt Law Review, 32:1249-341 (November 1979).

Lee, W. E. "Privacy Intrusions While Gathering News: An Accommodation of Competing Interests." Iowa Law Review, 64:1061-283 (July 1979).

Lerman, L. "Violent Pornography: Degradation of Women Versus Right of Free Speech--A Colloquium." Preface. New York Review of Law and Social Change, 8:181-300 (1978-1979).

Lewis, A. "A Preferred Position For Journalism?" Hofstra Law Review, 7:559-720 (Spring 1979).

"Linmark Associates, Inc. v. Township of Willingboro, 97 Supreme Court 1614 (1977)--'For Sale' Signs: The Right to Yell "Fire' in an Integrating Neighborhood?" University of Baltimore Law Review, 7:73-96 (Fall 1977).

"Listeners' Rights Providing a State Action Theory in the 'Company Town' Analogues." Indiana Law Journal, 55:91-115 (Fall 1979).

Lively, D. "Affirmative Action and a Free Press: Policies and Problems in Promoting the First Amendment." Pacific Law Journal, 11:65-94 (October 1979).

Lobue, R. P. and D. N. Edelstein "Journalist's Privilege and the Criminal Defendant." Fordham Law Review. 47:913-28 (May 1979).

LoBurgio, N. J. "Federal Employee Picketing: Regulation of a Privilege." Air Force Law Review, 21:330-63 (1979).

Lutten, S. B. "Give Me A Home Where No Salesman Phone: Telephone Solicitation and the First Amendment." Hastings Constitutional Law Quarterly, 7:129-64 (Fall 1979).

Maginnness, C. R. "Exchange of Price Information as a Restraint of Trade: Reassessing Per Se Rules in Light of First Amendment Protection of Commercial Speech." Fordham Law Review, 48:1005-26 (May 1980).

Makibe, M. J. and J. M. Vache "Privacy in Government Records: Philosophical Perspectives and Proposals for Legislation." Gonzaga Law Review, 14:515-57 (1979).

Maltz, E. M. and L. L. Hogue "On Keeping Pigs Out of the Parlor: Speech as Public Nuisance After FCC v. Pacifica Foundation (98 Supreme Court 3026)." South Carolina Law Review, 31:377-93 (January 1980).

"Maryland Court of Appeals Holds Unconstitutional Maryland's Anti-Residential Picketing Statute." University of Baltimore Law Review, 7:107-30 (Fall 1977).

McCarthy, William Osler "How State Courts Have Responded to Gertz in Setting Standards of Fault." Journalism Quarterly, 56:3 (Autumn 1979) 531-539.

McCoy, Craig R. "First Amendment Congress." The Quill, 68:3 (March 1980) 23-28.

"Media, the Public and Government--Is There a Constitutional Right of Access?" Louisiana Law Review, 39:1005-21 (Spring 1979).

Meiklejohn, D. "Courts, the Press, and the Public: The Case of Myron Farber [Farber, In re (NJ) 394 A 2d 330] and the New York Times." Syracuse Law Review, 30:789-823 (Summer 1979).

Miller, A. and J. Jones "Media and Terorist Activity: Resolving the First Amendment Dilemma." Ohio North Law Review, 6:70-81 (January 1979).

Mullen, M. J. "Proposed Criminal Code and the Press." George Washington Law Review, 47:502-22 (March 1979).

"Municipal Free Speech: Banned in Boston (First National Bank of Boston v. Bellotti, 98 Supreme Court 1407) (Anderson v. City of Boston (Mass) 380 N E 2d 628)?" Fordham Law Review, 47:1111-37 (May 1979).

Murdock, M. M. and J. N. Murdock "Corporate Expression in Wyoming Ballot Issues, Referenda and Initiatives: A Political and Legal Dilemma." Land & Water Law Review, 14:449-89 (1979).

Murphy, C. F. Jr. "Freedom of Expression--A Critique." University of Pittsburgh Law Review, 40:517-778 (Summer 1979).

"Narrowing the Scope of First Amendment Protection for Commercial Expression." Suffolk University Law Review, 13:1503-23 (Fall 1979).

Nassif, J. G. "Voluntary Document Disclosure and the Freedom of Information Act." Journal of the Missouri Bar, 36:243-51 (June 1980).

"National Security and the First Amendment: The CIA in the Marketplace of Ideas." Harvard Civil Rights Law Review, 14:655-709 (Fall 1979).

"New Commercial Speech Doctrine and Broadcast Advertising." Harvard Civil Rights Law Review, 14:385-484 (Summer 1979).

"News Media Access To Executive Sessions Under Oregon's Open Meeting Law." Oregon Law Review, 58:521-44 (1980).

"Newsperson's Privilege and the New York State Shield Law: A Proposal." Albany Law Review, 43:918-29 (Summer 1979).

"Newsperson's Privilege and the Right to Compulsory Process--Establishing an Equilibrium." Fordham Law Review, 48:694-734 (April 1980).

Nichols, John E. "The Pre-Tinker History of Freedom of Student Press and Speech." Journalism Quarterly, 56:4 (Winter 1979) 727-733.

Oakes, J. L. "Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma." Hofstra Law Review, 7:559-720 (Spring 1979).

"Obscenity, Profanity and the High School Press." Willamette Law Review, 15:507-29 (Summer 1979).

O'Kelly, C. R. Jr. "Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After First National Bank v. Bellotti (98 Supreme Court 1407)." Georgetown Law Journal, 67:1347-83 (August 1979).

"On Washing Dirty Linen in Public: Privacy and the First Amendment." Louisiana Law Review, 39:1211-25 (Summer 1979).

"Pacifica's (FCC v. Pacifica Foundation. 98 Supreme Court 3026) Seven Dirty Words: A Sliding Scale of the First Amendment." University of Illinois Law Forum, 1979:969-1007 (1979).

Palmer, G. "Defamation and Privacy Down Under." Iowa Law Review, 64:1061-283 (July 1979).

Parrish, L. E. "The 'Taken as a Whole' Standard to Determine the Oscene." New York Review of Law and Social Change, 8:181-300 (1978-1979).

Pember, D. R. "The Burgeoning Scope of 'Access Privacy' and the Portent for a Free Press." Iowa Law Review, 64:1061-283 (July 1979).

"Pennsylvania Obscenity Law: A Pornographer's Delight." University of Pittsburgh Law Review, 41:251-73 (Winter 1980).

Peskin, S. H. "Fair Trial/Free Press: A Novel Approach." Trial Lawyer's Quarterly, 12:60-75 (Winter 1978).

Pfeffer, L. "Freedom and/or Separation: The Constitutional Dilemma of the First Amendment." Minnesota Law Review, 64:561-84 (March 1980).

"Pig in the Parlor: F.C.C. v. Pacifica Foundation (98 Supreme Court 3026)." Western State University Law Review, 6:281-94 (Spring 1979).

"Political Speech, Inc.: The Belloti (First National Bank of Boston v. Bellotti, 98 Supreme Court 1407) Decision and Corporate Political Spending." Suffolk University Law Review, 13:1023-64 (Summer 1979).

Powell, L. F. Jr. "Symposium on the Press Clause." Hofstra Law Review, 7:559-720 (Spring 1979).

"Price Advertising in the Healing Arts: Is the First Amendment Hazardous to Your Health?" Pacific Law Journal, 10:1013-36 (July 1979).

Price, M. E. "Taming Red Lion: The First Amendment and Structural Approaches to Media Regulation." Federal Communications Bar Journal, 31:215-34 (Spring 1979).

"Private Expression is Subject to Constitutional Protection." Mercer Law Review 30:1079-85 (Summer 1979).

"Professional Trade Names: Unprotected Commercial Speech." Nebraska Law Review, 59:482-506 (1980).

"Public Forum Theory in the Educational Setting: The First Amendment and the Student Press." University of Illinois Law Forum, 1979:879-913 (1979).

Pulaski, C. A. Jr. "In-Person Solicitation and the First Amendment: Was Ohralik (Ohralik v. Ohio State Bar Association 98 Supreme Court 1912) Wrongly Decided?" Arizona State Law Journal, 1979:23-65 (1979).

Rabinowitz, M. A. "Nazis in Skokie (Village of Skokie v. Nationalist Socialist Party of Am (Ill. 373 N E 2d 21): Fighting Words or Heckler's Veto?" De Paul Law Review, 28:259-87 (Winter 1979).

Raivitch, Robert "First Amendment Congress, Part Two." The Quill, 68:5 (May 1980) 13-14.

Redlich, N. "Violent Pornography and the First Amendment: A Dialogue." Introduction. New York Review of Law and Social Change, 8:181-300 (1978-1979).

"Regulating Indecent Speech: A New Attack on the First Amendment." University of Pittsburgh Law Review, 41:321-41 (Winter 1980).

"Regulation of Advertising and Promotional Practices of Public Utilities Under the First Amendment." Fordham Urban Law Journal, 8:373-403 (1979-1980).

"Regulation of Indecency in Political Broadcasting." University of Michigan Journal of Law Reform, 13:69-101 (Fall 1979).

"Regulation of Programming Content to Protect Children After Pacifica (FCC v. Pacifica Foundation. 98 Supreme Court 3026)." Vanderbilt Law Review, 32:1377-417 (November 1979).

Reich, R. B. "Preventing Deception in Commercial Speech." New York University Law Review, 54:775-805 (October 1979).

Reisman, J. B.-A. "Freedom of Speech as Mythology, or 'Quill Pen and Parchment Thinking' in an Electronic Environment." New York Review of Law and Social Change, 8:181-300 (1978-1979).

Rendleman, D. "Free Press-Fair Trial: Restrictive Orders After Nebraska Press." Kentucky Law Review, 67:775-965 (1978-1979).

"Restraining Parties and Counsel From Disseminating Discovery Information." University of Cincinnati Law Review, 48:900-12 (1979).

"Restrictions on Communication by Class Action Parties and Attorneys." Duke Law Journal, 1980:360-84 (April 1980).

"Restrictions on Electric Utility Advertising." Michigan Law Review, 78:433-50 (January 1980).

"Right of Access to a Criminal Courtroom: Gannett Co., Inc. v. Depasquale (99 Supreme Court 2898)." University of Colorado Law Review, 51:425-48 (Spring 1980).

"Right to Know in First Amendment Analysis." Texas Law Review, 57:505-21 (Fall 1979).

Roberts, B. S. "Toward a General Theory of Commercial Speech and the First Amendment." Ohio State Law Journal, 40:115-52 (1979).

"Role of Summary Judgment in Political Libel Cases." Southern California Law Review, 52:1783-825 (September 1979).

Sack, R. D. "Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press." Hofstra Law Review, 7:559-720 (Spring 1979).

Sanford, Bruce W. "Richmond Newspapers: End of a Zigzag Trail?" Columbia Journalism Review, XIX:3 (September/October 1980) 46-47.

Scanlon, T.M. Jr. "Freedom of Expression and Categories of Expression." University of Pittsburgh Law Review, 40:517-778 (Summer 1979).

"Scapegoat Picketing: Beyond the Pale of Constitutional Protection." Fordham Law Review, 48:794-816 (April 1980).

Schauer, F. "Pornography and the First Amendment." University of Pittsburgh Law Review, 40:517-788 (Summer 1979).

Scott, T. "Jurisdiction Over the Press: A Survey and Analysis." Federal Communications Law Journal, 32:19-53 (Winter 1980).

"Search and Seizure of a Third-Party Newspaper: Zurcher, Chief of Police of Palo Alto v. Stanford Daily (98 Supreme Court 1970)." Boston College Law Review, 20:783-818 (May 1979).

"Separation of Church and State and Political Candidacy as a Fundamental Right." De Paul Law Review, 27:217-30 (Fall 1977).

Shaman, J. M. "First Amendment Rule Against Overbreadth." Temple Law Quarterly, 52:259-82 (1979).

Sheffer, M. S. "Free Exercise of Religion and Selective Conscientious Objection: A Judicial Response to a Moral Problem." Capital University Law Review, 9:7-29 (1979).

Shenefield, J. H. "Ownership Concentration in Newspapers." American Bar Association Journal, 65:1332-5 (September 1979).

"Shield Statutes: A Changing Problem in Light of Branzbrug." Wayne Law Review, 25:1381-403 (September 1979).

"Should Children be Protected from TV Commercials?" Human Rights, 8:24-7+ (Fall 1979).

Skene, N. "Watchdogs and Leash Laws: Restraints on the Press." Mercer Law Review, 30:615-32 (Spring 1979).

Smith, M. "Private Action Against Pornography: An Exercise of First Amendment Rights." New York Review of Law and Social Change, 8:181-300 (1978-1979).

"Solicitation By Attorneys: A Prediction and a Recommendation." Houston Law Review, 16:452-79 (1979).

Sowie, K. D. "Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report." New York University Law Review, 54:469-545 (June 1979).

"Speech That Aids and Abets Tax Fraud." Minnesota Law Review, 63:641-64 (April 1979).

"State Bar Association May Constitutionally Prohibit Attorneys From Soliciting Clients for Profit Through the Mail." Tulane Law Review, 53:962-73 (April 1979).

"State Constitution May Guarantee Broader Rights of Free Speech and Expression Than Those Rights Protected by the Federal Constitution." Washington University Law Quarterly, 1979:1161-8 (Fall 1979).

"State May Prohibit Optometrists' Use of Trade Names as Inherently Misleading Form of Commercial Speech." Mississippi Law Journal, 50:487-98 (June 1979).

"State Regulation of Obscene Motion Pictures: The Red Light Nuisance Statute." Alabama Law Review, 31:274-305 (Winter 1980).

"Statutory Prohibitions of Contributions or Expenditures of Corporate Funds to Influence Voters Held to be Unconstitutional Abridgment of Political Expression Under First Amendment." Drake Law Review, 28:718-27 (1978-1979).

Stephenson, D. G. Jr. "Fair Trial-Free Press: Rights in Continuing Conflict." Brooklyn Law Review, 46:39-66 (Fall 1979).

Stout, B. "One Reporter's View." Journal of the State Bar of California, 55:12-37 (January 1980).

"Sunlight in the County Jail: Houchins v. KQED, Inc. (98 Supreme Court 2588) and Constitutional Protection for Newsgathering." Hastings Constitutional Law Quarterly, 6:933-73 (Spring 1979).

Swan, P. N. "Publicity Invasion of Privacy: Constitutional and Doctrinal Difficulties with a Developing Tort." Oregon Law Review, 58:483-520 (1980).

Tankard, James W. Jr., Kent Middleton and Tony Rummer "Compliance with American Bar Association Fair Trial-Press Guidelines." Journalism Quarterly, 56:3 (Autumn 1979) 464-468.

Teeter, D. L. and S. G. Singer "Search Warrants in Newsrooms: Some Aspects of the Impact of Zurcher v. The Stanford Daily (98 Supreme Court 1970)." Kentucky Law Journal, 67:775-965 (1978-1979).

Terrell, T. P. "Petitioning Activities on Military Bases: The First Amendment Battle Rages Again." Emory Law Journal, 28:3-49 (Winter 1979).

Thain, G. J. "The 'Seven Dirty Words' Decision: A Potential Scrubbrush for Commercials on Children's Television?" Kentucky Law Journal, 67:775-965 (1978-1979).

"The California Constitution Protects Rights of Free Speech and Petition, Reasonably Exercised, in Privately Owned Shopping Centers." Santa Clara Law Review, 20:245-51 (Winter 1980).

"The Federal Communications Commission May Impose Sanctions on Broadcasters for the Presentation of Indecent Language without Violating the Statutory Prohibition of Censorship or the First Amendment." Drake Law Review, 28:745-57 (1978-1979).

"Tinker's Legacy: Freedom of the Press in Public High Schools." De Paul Law Review, 28:287-428 (Winter 1979).

"Toward Constitutional Privilege for the Editorial Process in Libel Suits?" De Paul Law Review, 27:1261-85 (Summer 1978).

"Trade Names Are Not a Protected Form of Commercial Speech." Texas Tech Law Review, 11:717-27 (Spring 1980).

Trager, Robert and Donna L. Dickerson "Prior Restraint in High School: Law Attitudes and Practice." Journalism Quarterly, 57:1 (Spring 1980) 135-138.

Trauth, Denise M. and John L. Huffman "Heightened Judicial Scrutiny: A Test for the First Amendment Rights of Children." Communications and the Law, 2:2 (Spring 1980) 39-58.

Trauth, Denise M. and John L. Huffman "New U.S. Supreme Court Philosophy on Advertising Faces Opposition." Journalism Quarterly, 56:3 (Autumn 1979) 540-545.

Tucker, E. W. "Use of Corporate Funds for Political Speech." Connecticut Bar Journal, 53:185-203 (June 1979).

"Unsolicited Commercial Telephone Calls and the First Amendment: A Constitutional Hangup." Pacific Law Journal, 11:143-67 (October 1979).

Van Niekerk, B. "Freedom of Speech Concerning the Administration of Justice--A Personal View from South Africa." Revista Judicada de la Universidad de Puerto Rico, 46:647-720 (1977).

"Violence on Television: An Old Problem With a New Picture." North Carolina Law Review, 58:97-136 (October 1979).

Wallace, M. B. "Corporate Free Speech and Campaign Finance in Mississippi." Mississippi Law Journal, 49:819-37 (December 1978).

Waters, K. "Pacifica (FCC v. Pacifica Foundation. 98 Supreme Court 3026) and the Broadcast of Indecency." Houston Law Review, 16:551-601 (1979)

"When Push Comes to Shove: The Newsman's Privilege Versus the Criminal Defendant's Right to Compulsory Process." Missouri Law Review, 44:784-96 (Fall 1979).

Yackle, L. W. "Confessions of a Horizontalist: A Dialogue on the First Amendment." Kansas Law Review, 27:541-91 (Summer 1979).

Yasser, R. L. "Federal Communications Commission v. National Citizen's Committee for Broadcasting (98 Supreme Court 2096): The Ultimate Media Hype." Kentucky Law Review, 67:775-965 (1978-1979).

"Zurcher v. Stanford Daily (98 Supreme Court 1970): The Legislative Debate." Harvard Journal on Legislation, 17:152-94 (Winter 1980).

Books

Barltett, Jonathan, editor. The First Amendment in a Free Society. New York: The H. H. Wilson Company, 1979.

Berger, Fred R. Freedom of Expression. Belmont, California: Wadsworth Publishing Company, 1980.

Davidson, Marion and Martha Blue. Making it Legal: A Law Primer for the Craftmaker, Visual Artist, and Writer. New York: McGraw-Hill, 1979.

Gordon, George N. Erotic Communications: Studies in Sex, Sin and Censorship. New York: Hastings House, 1980.

Hemmer, Joseph J. Jr. Communication Under Law, Volume I: Free Speech. Volume II: Free Press. Metuchen, N.J.: Scarecrow Press, 1979 and 1980.

Hentoff, Nat. The First Freedom: The Tumultuous History of Free Speech in America. New York: Delacorte Press, 1980.

Jenkinson, Edward B. Censors in the Classroom. Carbondale: Southern Illinois University Press, 1979.

Keller, Robert H. Jr. editor. In Honor of Justice Douglas: A Symposium on Individual Freedom and the Government. Westport, Connecticut: Greenwood Press, 1979.

Krasnow, Erwin G. and John C. Quale. A Candidate's Guide to the Law of Political Broadcasting. Washington: National Association of Broadcasters, 1980.

Levin, Harvey J. Fact and Fancy in Television Regulation: An Economic Study of Policy Alternatives. New York: Russell Sage Foundation, 1980.

Lofton, John The Press as Guardian of the First Amendment. Columbia: The University of South Carolina Press, 1980.

Patton, Warren L. An Author's Guide to the Copyright Law. Lexington, Massachusetts: Lexington Books/D.C. Heath, 1980.

Simmons, Steven J. The Fairness Doctrine and the Media. Berkeley: The University of California Press, 1978.

Smith, Jo Anne, editor. Mass Communications Law Casebook. Reynoldsburg, Ohio: Advocate Publishing Group, 1979.

Wilson, James Q. editor. The Politics of Regulation. New York: Basic Books, 1980.

Barnstone v. University of Houston, 100 S.Ct. 2144, 64 L.Ed.2d 488 (1980). Justice Powell, Circuit Justice, denied an appeal to reinstate a suspended order compelling the broadcast of a television program.

Branti v. Finkel, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). Discharge of public employees (assistant public defenders) who were satisfactorily performing their duties soley because of their political beliefs violates the First and Fourteenth Amendments. 6-3 decision with Stewart, Powell and Rehnquist dissenting.

Brown v. Glines, 100 S.Ct. 62 L.Ed.2d 609 (1980). Air Force regulations requiring approval of the commander before serviceman's circulation of petitions on base are not violative of First Amendment or the law prescribing restrictions on communications with legislators. 5-3 decision, with Brennan, Stewart and Stevens dissenting. Marshall did not participate.

Carey v. Brown, 100 S.Ct. 2289, 65 L.Ed.2d 263 (1980). Illinois statute barring picketing of residences, except for peaceful picketing of place of employment involved in a labor dispute, infringed both the First and Fourteenth Amendments. 6-3 decision, with Rehnquist, Burger and Blackmun dissenting.

Central Hudson Gas v. Public Service Commission, 100 S.Ct. 2343, 65 L.Ed.2d 341, 6 Med.L.Rptr. 1497 (1980). New York Public Service Commission regulation that bans all promotional advertising by electric utilities violates First and Fourteenth Amendment Provisions. 8-1 decision, Rehnquist dissenting.

Committee for Public Education and Religious Liberty v. Regan, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980). First Amendment establishment clause is not violated by the New York statutory scheme providing direct cash reimbursement from state funds to nonpublic schools for state-required testing and reporting. 5-4 decision, with Blackmun, Brennan, Marshall and Stevens dissenting.

Consolidated Edison v. Public Service Commission, 100 S.Ct. 2326, 65 L.Ed.2d 319, 6 Med.L.Rptr. 1518 (1980). New York Public Service Commission order barring electric utility's use of inserts discussing controversial public issues in billing envelopes violates First and Fourteenth Amendment Provisions. 7-2 decision, with Blackmun and Rehnquist dissenting.

In re Roche, 65 L.Ed.2d 1103, 6 Med.L.Rptr. 1551 (1980). Justice Brennan, acting as Circuit Justice, granted an application for a stay of enforcement of a state court order holding a reporter in contempt for refusal to disclose identities of news source, asserting that First Amendment interests prevail against finding that information sought could be obtained by other, albeit less convenient means.

Kissinger v. Reporters Committee, 100 S.Ct. 960, 63 L.Ed.2d 267, 6 Med.L. Rptr. 1001 (1980). Notes of former Secretary of State not possessed or controlled by the State Department, and notes covering the time Secretary was National Security Advisor, can not be obtained for public use under the Freedom of Information Act. Majority included Rehnquist, Burger, Stewart, White and Powell. Brennan and Stevens concurred in part and dissented in part. Marshall and Blackmun did not participate.

National Labor Relations Board v. Retail Store Employees Union, 100 S.Ct. 2372, 65 L.Ed.2d 377 (1980). Prohibiting of secondary picketing by insurance underwriter's employees of neutral title companies selling underwriter's insurance by NLRB ruling violated the First Amendment. 6-3 decision, with Brennan, White and Marshall dissenting.

Pruneyard Shopping Center v. Robins, 100 S.Ct. 2035, 64 L.Ed.2d 741, 6 Med.L. Rptr. 1311 (1980). The U.S. Supreme Court upheld the California Supreme Courts interpretation of the California Constitution sanctioning the use of a shopping center in a peaceful and orderly manner to circulate petitions not directly related to the center's commercial purpose. Unanimous in judgement.

Richmond Newspapers v. Virginia, 100 S.Ct. 2814, 65 L.Ed.2d 973, 6 Med.L.Rptr. 1833 (1980). State trial judge's order at the request of the accused closing murder trial to the public and the press, violated the First and Fourteenth Amendments, since both the public and the press have an independent right of access to attend criminal trials. 7-1 decision, with Rehnquist dissenting and Powell not participating.

Schaumburg v. Citizens for Better Environment, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). Ordinance barring solicitation of contributions by charitable organizations which do not use 75 percent of their receipts for charitable purposes is overbroad and therefore is in violation of the First and Fourteenth Amendments. 8-1 decision, with Rehnquist dissenting.

Secretary of Navy v. Huff, 100, S.Ct. 606, 62 L.Ed.2d 607 (1980). Navy and Marine Corps regulations requiring servicement on overseas bases to obtain command approval for on-base circulation of petitions to Congressmen are not violative of law prescribing restrictions on communications with legislators. 5-3 decision, with Brennan, Stewart and Stevens dissenting. Marshall did not participate.

Snepp v. United States, 100 S.Ct. 763, 62 L.Ed.2d 704, 5 Med.L.Rptr. 2409 (1980). Former CIA employee's breach of his employment agreement not to publish any CIA-related information without agency's prepublication review and clearance justified a court's impoundment of profits earned by him from a book that was published in violation of the contractual agreement. 6-3 decision, with Stevens, Brennen and Marshall dissenting.

Supreme Court of Virginia v. Consumers Union, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980). The First and Fourteenth Amendment rights do not extend to include gathering and publishing information concerning attorney fee and billing practices, nor to include the right to gain an injunction against the Supreme Court of Virginia barring the enforcement and operation of a prohibition against attorney advertising. 8-0 decision, with Powell not participating.

Vance v. Universal Amusement, 100 S.Ct. 1156, 63 L.Ed.2d 413, 5 Med.L.Rptr. 2553 (1980). A Texas public nuisance statute permitting injunctions against future exhibition of named and unnamed "obscene" films was held an unconstitutional prior restraint since it did not provide adequate procedural safeguards. 5-4 decision, with Burger, Powell, White and Rehnquist dissenting.

Note also: "Revised Report to the Judicial Conference Committee on the Operation of the Jury System on the 'Free Press--Fair Trial' Issue." 6 Med.L.Rptr. 1897-1901 (1980). "Free Press--Fair Trial Proposed Revised Guidelines of the Judicial Conference of the United States--1980." 6 Med.L.Rptr. 1901-1909 (1980).

Dissertations

This section of the bibliography is an expansion of the normal contents, and we hope it is of value to our readers. The 1978 Yearbook contained an earlier listing of dissertations, and this section contains additional titles on Free Speech--Free Press topics.

Appreciation is extended to John Neal for providing considerable input for this listing. Citations of works that have been missed will be welcomed for subsequent issues of the bibliography.

Bass, Larry Rober. "The Constitution and the Public Mind." Ph.D. dissertation, Kent State University, 1976.

Barth, Thomas Emil. "Perception and Acceptance of Supreme Court Decisions at the State and Local Level: The Case of Obscenity Legislation in Wisconsin." Ph.D. dissertation, University of Wisconsin-Madison, 1968.

Belknap, Michael Robert. "The Smith Act and the Communist Party: A Study in Political Justice." Ph.D. dissertation, University of Wisconsin-Madison, 1973.

Binion, Gayle Natalie. "The Evolution of Constitutional Doctrine: The Role of Justice Steward on a Changing Supreme Court." Ph.D. dissertation, University of California-Los Angeles, 1977.

Bissland, James Hope. "Reforming the Press: The Democratic Alternative to News Media Bureaucracy." Ph.D. dissertation, University of Iowa, 1976.

Bliss, Robert McKinley. "Some Implications for Mass Communications in New York Times Company v. Sullivan: Presumption of Privilege in Public Libel." Ph.D. dissertation, University of Iowa, 1967.

Busha, C. H. "The Attitudes of Midwestern Public Librarians Toward Intellectual Freedom and Censorship." Ph.D. dissertation, Indiana University, 1971.

Canon, Bradley, Charles. "The FCC's Fairness Doctrine: Its Substance Enforcement and Impact." Ph.D. dissertation, University of Wisconsin-Madison, 1967.

Cantelon, Philip Louis. "In Defense of America: Congressional Investigations of Communism in the United States, 1919-1935." Ph.D. dissertation, Indiana University, 1971.

Chamberlin, William Ray. " A History of Public Issues Programming Regulation by the FCC: More Rhetoric than Action." Ph.D. dissertation, University of Washington, 1977.

Clift, Charles Eugene. "The WLBT-TV Case, 1964-1969: An Historical Analysis." Ph.D. dissertation, Indiana University, 1976.

Dvorak, John Edward. "High School Principal-Newspaper Advisor's Relationships and Their Effects on Freedom of School-Sponsored Newspapers." Ph.D. dissertations, University of Missouri-Columbia, 1975.

England, Chaire St. Clere. "The Climate of Censorship in Ontario: An Investigation into Attitudes Toward Intellectual Freedom and the Perceptual Factors Affecting the Practice of Censorship in Public Libraries Serving Medium-Sized Populations." Ph.D. dissertation, University of Toronto, Canada, 1974.

Eshenaur, Ruth M. "Censorship of the Alternative Press: A Descriptive Study of the Social and Political Control of Radical Periodicals, 1964-1973." Ph.D. dissertation, Southern Illinois University, 1975.

Fiorino, Daniel Joseph. "The Federal Courts and the Regulatory Process: The Cases of Natural Gas and Broadcasting." Ph.D. dissertation, Johns Hopkins University, 1977.

Firch, Robert Paul. "A Theory of Rights" Ph.D. dissertation, Duke University, 1976.

Gaddy, Dale Everette. "Judicial Interpretations and Certain Other Aspects of Student Academic Freedom in American Higher Education." Ph.D. dissertation, Duke University, 1968.

Godfrey, Donald George. "A Rhetorical Analysis of the Congressional Debates on Broadcast Regulation in the United States, 1927." Ph.D. dissertation, University of Washington, 1975.

Gormbey, William Thomas. "The Effects of Newspaper-TV Cross-Ownership on News Homogeneity." Ph.D. dissertation, University of North Carolina at Chapel Hill, 1976.

Grunis, A. D. "Freedom of Assembly in Canada." Ph.D. dissertation, York University, Canada, 1977.

Hammit, Francis E. "School Library Legislation in Indiana, Illinois, and Wisconsin: A Historical Study." Ph.D. dissertation, University of Chicago, 1949.

Hart, Rosemary. "J. Robert Oppenheimer: A Case Study in the Strategies of Self-Defense in a Government Security Hearing." Ph.D. dissertation, University of Minnesota, 1977.

Hartenberger, Karen Schmidt. "Selected Speeches on Obscenity by Federal Communications Commission Chairman Dean Bruch, 1969-1974." Ph.D. dissertation, Wayne State University, 1975.

Howells, R. F. "An Analysis of Editorial Freedom and Administrative Control of the Student Newspaper." Ph.D. dissertation, State University of New York at Albany, 1973.

Hughes, F. K. "County Workhouse: A Case Study of Disorder and Symbolic Expression in a Correctional Establishment." Ph.D. dissertation, Rutgers University, The State University of New Jersey at New Brunswick, 1976.

Hughes, Patricia Ann. "John Stuart Mill: Reconciling Irreconciliables." Ph.D. dissertation, University of Toronto, Canada, 1975.

Hull, Elizabeth Anne. "Sherman Minton and the Cold War Court." Ph.D. dissertation, New School for Social Research, 1977.

Jennings, John Kelly. "The Regulators and the Regulated: A Study of Broadcasters Perceptions of FCC Members and FCC Voting Behavior." Ph.D. dissertation, Stanford University, 1975.

Jassem, Harvey C. "Applicability of the Fairness Doctrine to Product Commercials: The Evolution of Policy." Ph.D. dissertation, University of Wisconsin-Madison, 1977.

Johnson, Ralph Hugo. "Blunting the Thrust of Anti-Trust: A Legal and Historical Study of the Citizen Publishing Case and the Newspaper Preservation Act." Ph.D. dissertation, University of Wisconsin-Madison, 1975.

Jordan, Malcolm Stewart. "The Judiciary's Inherent Power of Contempt: Clash Between the Court and the Advocate." Ph.D. dissertation, University of Southern California, 1973.

Jurkow, Keith A. "The Bill of Rights, Due Process, and the States." Ph.D. dissertation, New School for Social Research, 1973.

Kamp, John Francis. "Communication and Obscenity: A Framework for Adjudication by the United States Supreme Court." Ph.D. dissertation, University of Iowa, 1975.

King, Thomas J. "Freedom and Control Over Student Publications in the American High School." Ph.D. dissertation, University of Wisconsin-Madison, 1946.

Knecht, Richard John. "An Alternative to Cable Regulation: The Office of Telecommunications Policy Proposed Bill, and an Analysis of the Responses to It, July, 1971 to January, 1976." Ph.D. dissertation, The Ohio State University, 1977.

La Follette, Hugh. "A Critique of the Libertarian View of Rights." Ph.D. dissertation, Vanderbilt University, 1977.

Levin-Epstein, Eve. "The Rhetoric of the Supreme Court: A Dramatistic Analysis of First Amendment Dissenting Opinions." Ph.D. dissertation, Temple University, 1978.

Meyer, Karl E. "The Politics of Loyalty, From La Follette to McCarthy in Wisconsin, 1918-1952." Ph.D. dissertation, Princeton University, 1956.

Miller, David Martin. "Governing Practices of Cable TV and Its Relationship to Telephone Common Carriers." Ph.D. dissertation, Ohio State University, 1976.

Newman, Steven Leonard. "The Oppenheimer Case: A Reconsideration of the Role of the Defense Department and National Security." Ph.D. dissertation, New York University, 1977.

Nichols, J. E. "Federal Constitutional Protection of Freedom of the High School and College Student Press." Ph.D. dissertation, University of Wisconsin-Madison, 1976.

Nicholas, William Elmer III. "Academic Dissent in World War I, 1917-1918." Ph.D. dissertation, Tulane University, 1970.

Paull, J. A. "An Analysis of Court Rulings and School District Policy on Obscenity and Freedom to Teach." Ph.D. dissertation, West Virginia University, 1974.

Perry, Eugene Harvey. "Alexander Meiklejohn and the Organic Theory of Democracy." Ph.D. dissertation, University of Wisconsin-Madison, 1969.

Pommer, Geoffrey Michael. "The Political Use of the Conspiracy Charge in America." Ph.D. dissertation, University of Missouri-Columbia, 1976.

Poraschos, Emmanual Euminis. "National Security and the People's Right to Know." Ph.D. dissertation, University of Missouri-Columbia, 1976.

Pratt, James Robert. "A Study of the Legal Aspects of Freedom of Speech in the School-Sponsored Student Press at the Secondary School Level." Ed.D. University of Alabama, 1978.

Pullen, Richy D. "A Comparison and Contrast of the Libertarian and Social Responsibility Theories of the Press Based on United States Supreme Court Decisions," Ph.D. dissertation, Southern Illinois University, 1973.

Reeb, Richard H. Jr. "The Role of the Press in American Democracy: The Contemporary Press and the Problem of Objectivity." Ph.D. dissertation, Claremont Graduate School, 1974.

Robertus, Patrick. "Postal Control of Obscene Literature, 1942-1957." Ph.D. dissertation, University of Washington, 1974.

Rothwell, Daniel John. "Verbal Obscenity: Constructing and Testing a Theoretical Model." Ph.D. dissertation, University of Oregon, 1977.

Schwartz, Adina Beth. "John Stuart Mill: A Program for Social Philosophy." Ph.D. dissertation, Rockefeller University, 1976.

Sigler, Ronald Floyd. "The Film Censorship Controversy at Los Angeles County Public Library-1971: A Case Study." Ph.D. dissertation, Florida State University, 1977.

Sinner, Michael William. "Newsmens Privilege and Branzenburg v. Hayes: From Legal Antecedents to Recent Political Effects." Ph.D. dissertation, University of Tennessee. 1976.

Stevens, John Dean. "Suppression of Expression in Wisconsin During World War I." Ph.D. dissertation, University of Wisconsin-Madison, 1967.

Sullivan, Maurice Michael. "Academic Freedom in Historical-Legal Context." Ph.D. dissertation, Miami University, 1971.

Sullivan, Paul William. "The Modern Free Press-Fair Trial Precedent: A Study of the Origins of Irvin v. Dowd." Ph.D. dissertation, University of Iowa, 1970.

Thornberry, Mary Caroline. "Local Level Compliance With Supreme Court Dicisions." Ph.D. dissertation, University of Michigan, 1975.

Van Gerpen, Maurice Dale. "Privileged Communications and the Press." Ph.D. dissertation, University of California-Santa Barbara, 1975.

Wallfisch, Mark C. "The Conflict Between Freedom and Control in the Education Opinions of Justice William O. Douglas." Ph.D. dissertation, Duke University, 1978.

Weitery, Harvey Lee, Jr. "A Theory of Rights." Ph.D. dissertation, Princeton University, 1976.

Wiggins, Robert Gene. "Access to the Mass Media: Public's Right or Publishers Privilege?" Ph.D. dissertation, Southern Illinois University, 1973.

Williams, John Duncan. "Variables in Government Media Interaction: Freedom of Information, Security, and Social Responsibility." Ph.D. dissertation, University of Texas-Austin, 1972.

Wolbert, James Alvin. "Regulatory Decision-Making: The FCC (1966-1975)." Ph.D. dissertation, Michigan State University, 1976.

Wright, Richard George. "Toward a Theory of Political Freedom." Ph.D. dissertation, Indiana University, 1976.

Zeller, Dennis Edward. "The Limits of Freedom." Ph.D. dissertation, University of Texas-Austin, 1975.

H-BOMB "SECRETS" AND THE PROGRESSIVE

Gregg Phifer
Florida State University

Law professors have often used the issue of the hydrogen bomb to test the limits of the rules against prior restraint. Suppose, they would ask their students, some journal were about to publish an article disclosing the secrets of the hydrogen bomb. Might prior restraint be justified in such a case? In 1979 the hypothetical became real. The Progressive, a struggling magazine of forty-thousand circulation founded by "Fighting Bob" La Follette of Wisconsin in 1909 and kept alive by extra contributions from thousands of subscribers, scheduled for its April issue Howard Morland's article entitled, "The H-Bomb Secret: How we got it--why we're telling it."

As the editors were not experts in nuclear fusion/fission, they routinely sent copies to several scientists for evaluation and criticism. One went to George Rathjens, professor at Massachusetts Institute of Technology and occasional government consultant. Rathjens called Samuel Day, managing editor of the Progressive and expressed concern that the article contained "secrets" that should not be published. Then Rathjens sent his copy of the manuscript to John A. Griffin, director of classification at the Department of Energy (DOE).[1]

Morland's article described the experience of Congressman Ronald V. Dellums of California. A member of the House Armed Services Committee, Dellums asked DOE why it expected a shortage of plutonium in the production of nuclear weapons and why, therefore, it wanted to rebuild its Hanford, Washington, plant. Three weeks later, DOE replied that his questions were classified as secret/restricted data--yes, his questions, not the answers.[2]

If a member of Congress had trouble with DOE, perhaps the Progressive editors should be concerned. They gave a copy of Morland's manuscript to their friend, legal counsel, and chairman of the Progressive's board of governors, Gordon Sinykin. After reviewing the Atomic Energy Act of 1954 Sinykin called to warn that its provisions were sweeping indeed.[3] In Chapter 2 of "Public Law 703--Aug. 30, 1954," the term "Restricted Data" is defined as "all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142." Section 142 deals with the "Classification and Declassification of Restricted Data" and requires the Atomic Energy Commission (AEC, now submerged in DOE) "from time to time to determine the data, within the definition of Restricted Data, which can be published without undue risk to the common defense and security and shall thereupon cause such data to be declassified and removed from the category of Restricted Data." The key to Section 142 is that everything on the subject listed in definition "r" of Chapter 2 is classified unless specifically and affirmatively declassified by AEC. The Commission does not classify and therefore identify material that may not be published; it declassified and therefore identifies materials that may be published. Only affirmative action by the Commission permits the publication or dissemination of material dealing with atomic weapons or production of atomic energy.

And what happens to those violating the act? Section 224 of Chapter 18 ("Enforcement") concerns the "Communication of Restricted Data":

> Whoever, lawfully or unlawfully, having possession of, control over, or being entrusted with any document, writing, sketch, photograph, plan, model, instrument, appliance, note, or information involving or incorporating Restricted Data--
>
> a. communicates, transmits, or disclosed the same to any individual or person, or attempts or conspires to do any of the fore-going, with intent to injure the United States or with intent to secure an advantage to any foreign nation, upon conviction thereof, shall be punished by death or imprisonment for life (but the penalty of death or imprisonment for life may be imposed only upon recommendation of the jury), or by a fine of not more than $20,000 or imprisonment for not more than twenty years, or both
>
> b. communicates, transmits, or discloses the same to any individual or person, or attempts or conspires to do any of the fore-going, with reason to believe such data will be utilized to injure the United States or secure an advantage to any foreign nation, shall upon conviction, be punished by a fine of not more than $10,000 or imprisonment for not more than ten years or both.

My purpose in this article is to review the basic issues of the case and to show, so far as the public record permits, the clashing arguments of Government and Progressive lawyers.

The Basic Issue

The basic issue of the case was this: Were the three basic concepts of Morland's H-bomb article properly identified by the Government as "Secret Restricted Data" not yet in the public domain?

In an affidavit for the United States, Secretary of Defense Harold Brown identified himself as holding a doctorate in physics from Columbia University with "direct and thorough knowledge with respect to nuclear weapons design." He had reviewed the Morland article and found that it described "correctly, in general, the basic principles of the functioning of a thermonuclear weapon, including Secret Restricted Data on the basic principles of the functioning of a thermonuclear weapon that has not been made available to the public in unrestricted sources."[4]

Charles N. Van Doren, assistant director of the Arms Control and Disarmament Agency, testified, "Of all the manuscripts purporting to be unclassified that I have reviewed in my twelve years in this field, this one, if made public, appears to be the most flagrant example of deliberate dissemination of sensitive weapons design information. . ."

The affidavit of Jack Rosengren, a nuclear physicist and consultant with the Department of Energy, stated: "My appraisal of the article is that it contains a significant amount of information which is properly classified as Secret Restricted Data.

"It provides a more comprehensive, accurate, and detailed summary of the overall construction and operation of a thermonuclear weapon than any publication to date in the public literature."

One of the Government's affidavits ironically came from Hans A. Bethe, physicist of Cornell University. His article, written for Scientific American of April, 1950, was one of the first censored by the Atomic Energy Commission.[5] The April issue was in press when the AEC ordered the presses stopped, destroyed some three thousand copies of the magazine and the plates of Dr. Bethe's article, and insisted that four specific concepts be deleted from Bethe's explanation because they were secret. Publisher Gerard Piel consented. He felt it better for the public to have some theory from Bethe's article as a basis for public debate over testing the H-bomb than to have no information at all. Three deletions from Bethe's article had been published previously by Scientific American; the "fourth concept was a deliberately false piece of technical information included to slow Russian development of the bomb. The AEC also deleted what was false."

Three decades later, when the AEC's successor the Department of Energy moved to censor the Progressive, Gerald Piel wrote the New York Times commenting that:

> all pieces of technical information needed to make atomic and hydrogen bombs were in the public domain of the world community of physics in 1939. In the thirty years since America lost its imagined monopoly on the atomic secret, we should have learned that there never was a secret that could keep another country from making a bomb.[6]

It was not easy, but Samuel H. Day, managing editor of the Progressive and former editor of the Bulletin of the Atomic Scientists, managed to find a few "Scientists of Conscience" to counter the Government's heavy artillery. Even though these men did not always agree with the Progressive's decision to print the article (they found its science sloppy and its political point questionable), they could not in good conscience permit the Government to call the concepts of Morland's article "Secret Restricted Data."[7]

One of the first to support the Progressive was Theodore A. Postol, staff physicist of the Argonne National Laboratory. In his first affidavit he said:

> It is my opinion that the article by Morland contains no information or ideas that are not already common knowledge among scientists, including those who do not have access to classified information. . . the article contains no ideas or information which could not be readily concluded or obtained by any competent physicist after seeing the diagram prepared by Dr. Edward Teller for his article on the hydrogen bomb in the Encyclopedia Americana. . . furthermore, the ideas and information contained in the Morland article would be arrived at not within years, but within hours.[8]

Postol prepared a second affidavit showing the reasoning process involved in this extrapolation from Teller's article. The Government promptly suppressed Postol Affidavit No. II and entered it in the court's secret file. Other affidavits were prepared by Ray E. Kidder, Hugh E. DeWitt, Ralph Hager, and Calvin G. Andre, all staff physicists at Lawrence Livermore Laboratory; and by other physicists at California State University, Fullerton; Stanford Linear Accelerator Center, Stanford, California; University of Colorado in Boulder, and University of California in Berkeley.

At the request of the Departments of Justice, Defense, State, and Energy, Federal District Judge Robert W. Warren, a Nixon appointee with a law-and-order reputation, issued a temporary restraining order against publication of the Morland article.[9] On March 26, after seeing the Government affidavits and those

collected with much difficulty by the Progressive, Judge Warren issued a preliminary injunction prohibiting publication, Promising to go to the Supreme Court if necessary, the Progressive promptly filed an appeal to the Seventh Circuit Court in Chicago, which set September 10 for a hearing.

One last time the Progressive returned to Judge Warren's court. Dmitri Rotow was the Harvard undergraduate who, using only information clearly in the public domain, designed a workable atomic bomb. Retained by the American Civil Liberties Union, he went to the Los Alamos Scientific Laboratory in New Mexico, searching on the open shelves of its documents room for unclassified material demonstrating that concepts of the Morland article were already in the public domain. He found two appropriate documents (UCRL-4725 and UCRL 5280), made copies of the relevant sections, left some copies and UCRL-4725 (with no classified stamp) on the table overnight. When he returned next morning the document was missing, his copies had been removed, his document was not on the shelf, and the index card had been removed from the catalogue. Authorities next closed the library.[10]

Armed with this information, lawyers from the Progressive went back to Judge Warren on June 15 asking that he lift the injunction. Even though UCRL-5280 had been declassified for three years, it was so sensitive in the eyes of the Justice Department that, rather than produce it, the department stipulated that it revealed "the three concepts which the Government has described as the essential secret of the H-bomb." Even so, the Government opposed lifting the injunction. For the third time Judge Warren ruled against the Progressive, then promptly classified his own opinion as too sensitive for the public to read.[11]

At no time did the Government accuse Morland of using classified documents or of obtaining information illegally. DOE knew that he was studying the production of nuclear weapons; Charles Gilbert, Deputy Director of Military Applications, DOE, agreed that Morland might ask any questions he wished and, (in Morland's words) that, "It was up to the person who was talking to me to know whether the answer to my question is classified or not."[12]

In his affidavit prepared by Judge Warren's court, Morland submitted four encyclopedia articles. Later he commented:

> Pertinent passages were underlined. Government attorneys contended that although the articles were clearly in the public domain, my underlinings constituted a security violation. Clean copies of the articles had to be found for release to the press.
>
> One exhibit with my affidavit was more troublesome. It was a chapter from a college physics text, the one I had used as a freshman in 1961. The underlining in that exhibit had to go as well, but those underlinings had been made in the book itself, eighteen years ago. A clean copy could not be found. I could certainly never have known in the spring of 1961, when I marked a particularly interesting passage in a chapter on electro-magnetic radiation, that in 1979 the Federal government would ask me to paint out those underlinings with typing correction fluid, in the name of "national security."[13]

At the March 26 hearing before Judge Warren, Earl Munson, representing the Progressive, held up Volume 9 of the 1979 World Book Encyclopedia, bought for his nine-year-old daughter, and pointed to one of Morland's sources: "How the Hydrogen Bomb Works" (page 414). Munson argued further that the injunctive power of the Atomic Energy Act was unconstitutional and the Government's use of the "Restricted Data" label capricious. The first time DOE went through the Morland article it bracketed 2,190 words as Restricted Data;

the second time it objected to only 1,322 words.[14]

To the Progressive editors and lawyers, the Government's case on the first issue seems weak. Erwin Knoll, Progressive editor, said that very early in the case he became convinced that the Government could not win.[15] For this reason the Progressive scrupulously obeyed the letter of the injunction. When one caller said he had a copy of the Morland article and would print it, Knoll "begged him not to."[16] As the Morland article was finally published in November, Knoll wrote:

> As it became increasingly clear to us that we would win the case in the courts--and perhaps win a ruling that invalidated the secrecy provisions of the Atomic Energy Act--we began to suspect that the Government would seize on its first face-saving opportunity to drop the case and declare it "moot."[17]

Others were not so sure that the Supreme Court would not uphold the injunction. The Supreme Court membership had changed since the 1971 Pentagon Papers case: Black, Harlan, and Douglas had left the Court and been replaced by Stevens, Powell, and Rehnquist. Stevens was an appointee of President Ford; the other two were appointed by Nixon. The secrecy mystique surrounding atomic energy in general and the H-bomb in particular remained strong in the public and the press, all with the complete approval of the relevant departments of the federal government.

We know, at least in part, the thinking of Judge Warren. In issuing his temporary restraining order, Warren admitted that he had not read the Morland article but that "I would want to think a long, hard time before I'd give a hydrogen bomb to Idi Amin. It appears to me that is just what we're doing here."[18]

In issuing his preliminary injunction Warren admitted that the article "does not provide a do-it-yourself guide for the hydrogen bomb." A thermonuclear capacity requires a sophisticated industrial capability and access to the necessary scientists and technicians. The article, said Warren, "provides a more comprehensive accurate, and detailed analysis of the overall construction and operation of a thermonuclear weapon than any publication to date in the public literature." It could, therefore, "provide sufficient information to allow a medium-sized nation to move faster in developing a hydrogen weapon. It could provide a ticket to bypass blind alleys."

Judge Warren recognized the dangers: A mistake in ruling against the Progressive "will seriously infringe cherished First Amendment rights. . . [but] a mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot."

With respect to the first issue it is difficult for one not a part of the classified establishment (those accustomed to reading classified information as part of the job) or carried away by the secrecy mystique surrounding atomic energy to side with the Government. Clearly the concepts of the Morland article had appeared in many places before the Progressive finally printed them.[19] It is true that Morland put two and two together in an original and insightful way, and he did do so for a magazine circulating outside the scientific community, even though to only forty-thousand subscribers--not including Idi Amin. Those who, for whatever reason, wished to preserve the security mystique of the H-bomb felt otherwise. The weight of the evidence seems tipped against them.

Albert Einstein put it well only a short two years after the first atom bomb exploded over Hiroshima: "There is no secret and there is no defense; there is no possibility of control except through the aroused understanding and insistence of the peoples of the world."

Almost in desperation the Government introduced a novel idea, that technical information on weapons, like obscentiy, lies outside the protection of the First Amendment. It is hard to tell how serious the Government lawyers were, but acceptance of this position would put many issues outside the pale of public discussion. It does not seem a defensible position in our technologically advanced society.

Second Critical Issue

The first issue is basically one of fact: Were the concepts in the public domain (published openly in the past) or were they not? The second issue requires judicial evaluation: Did the Government's case against Morland and the Progressive meet the stringent requirements set by the Supreme Court for prior restraint against publication?

The Government tried very hard to keep the focus on "national security," one of the god-terms of the contemporary era. Secretary of Energy James Schlesinger telephoned editors of many leading newspapers to warn that the Progressive case involved a breach of national security and should not be treated as a First Amendment issue. Secretary of Defense Harold Brown carried the same message in person. The Carter administration put its prestige on the line.[20]

Defense and Energy may have indulged in overkill for many newspapers were all too ready to take the government's word at face value. The Los Angeles Times (March 13) feared that this case "might well end in the imposition of prior restraint on publications for the first time in the history of this country. It is the wrong issue, at the wrong time, in the wrong place." Editor & Publisher, the magazine of the trade, headed its March 17 editorial "Bad cases make bad laws." It feared that if, as seemed likely, the case went all the way to the Supreme Court, that tribunal "probably supported by public opinion will sustain the Atomic Energy Act and we feel the press and the public will be the losers." Even the Washington Post, the paper that broke the Watergate scandal, called the clash "John Mitchell's Dream Case" (March 11), warned that "in view of the poor judicial climate, this case is still a First Amendment loser." The Post advised, perhaps gratuitously, that the Progressive should compromise "by publishing a version of the article acceptable to the Government." The St. Louis Post-Dispatch (March 13) thought that "fears over the horrendous power of the hydrogen bomb may tilt the scales of justice against a free press." Its editorial went on to urge, however, that "this case deserves. . . a careful hearing, with the benefit of any doubt being given to free speech and a free press."

Particularly interesting was the reaction of the New York Times, which, with the Washington Post, was involved in the last case of attempted prior restraint: the attempt of the Government to restrain publication of the Pentagon Papers.[21] Initially, the Times waffled: Could a two-weeks delay mean disaster to a monthly publication? The Times, after all, had been in possession of the Pentagon Papers for three months before beginning publication.[22] The Times, however, sent for the papers the Progressive submitted to the Court in defense of its right to publish and on March 25 came to a strong defense of the First Amendment.

Samuel H. Day, managing editor of the Progressive, had been editor of the Bulletin of Atomic Scientists and knew many leaders of the scientific community personally. He was totally unprepared for the initial reaction of many leading scientists.[23] Informed only by media reports of Government action to secure a restraining order, and reading an inaccurate and misleading title ("How the H-Bomb Works"), several scientists offered quick judgments. Henry Kendall of M.I.T., founder and chairman of the Cambridge-based Union of Concerned Scientists and long-time critic of Atomic Energy Commission cover-ups, called the Progressive's decision to publish the article an "irresponsible act." Three members of the directorship of the Federation of American Scientists telegraphed Day: "Your effort to publish. . . is not in the interest of nonproliferation but quite the reverse. . . . We urge you in the name of the atomic scientists of conscience who founded our organization to do whatever you

can to mitigate the damage this action has caused." Eleven distinguished members of the American Association for the Advancement of Science--the AAAS Committee on Scientific Freedom and Responsibility--urged in a telegram: "The dispute between the U.S. Government and Progressive magazine over the publication of an article bearing on the workings of a hydrogen bomb has brought home to us the desirability of settling cases like this without litigation. . . We would prefer to have these sensitive issues resolved by voluntary editorial changes by the publisher after discussions with the Government, if necessary." Not one of these scientists had read the Morland article. Their statements on the basis of hearsay seemed premature and somehow unscientific to the journalists editing Progressive.

First Amendment Limitations

Except for absolutists like Justice Black (who died in 1971), Supreme Court justices have been unwilling to grant the First Amendment restrictions against interference with free speech and a free press the "never, never" status desired by some. In Holmes's classic phrase in Schenck v. U.S., even "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[24] A different image was used by Chief Justice Hughes to the same end in Near v. Minnesota: "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[25]

Undoubtedly Government lawyers (or some of them at least)believed and argued that encouragement of nuclear proliferation offered a far greater menace to the security of the United States than printing details about departure of a troop ship. For the second time in the decade the Government asked the courts to impose prior restraint on publication. The first, of course, involved the New York Times and the Washington Post in their publication of the Pentagon Papers. Some publication had already taken place. The Government asked the courts to stop further publication.

In the case of the Times the courts acted hastily--far too hastily to satisfy Chief Justice Warren Burger. Not even a week intervened between the initial restraining order by the federal district judge (June 25) and the 6-3 decision of the Supreme Court (June 30) upholding the right of the Times to publish the documents. Because of the speed with which the Court acted, the justices reached no consensus and left no single opinion to which to point. Even so, the opening summary repeated the familiar Supreme Court dictum that "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." This being true, the Government "carries a heavy burden of showing justification for the imposition of such a restraint."[26]

All six Justices (Black, Douglas, Brennan, Stewart, White, Marshall) making up the majority in the New York Times case wrote individual opinions as did all three of the dissenting justices (Chief Justice Burger, Justices Harlan and Blackmun). It is not easy therefore, to cite a single opinion. Five years later, in 1976, Chief Justice Burger wrote the opinion of the Court in the case of Nebraska Press Association v. Stuart (427 U.S. 539). His summary of previous decisions concludes thus: "The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." (Nebraska Press, at 559).

In his concurring opinion, Justice Brennan thus summarized the New York Times decision (Nebraska Press, at 593):

> . . . a majority of the other Justices who expressed their views on the merits made it clear that they would take cognizance only of a "single, extremely

> narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overriden.". . . Although variously expressed, it was evident that even the exception was to be construed very, very narrowly: when disclosure "will surely result in direct, immediate, and irreparable damage to our nation or its people." . . . or when there is "governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea[emphasis added]."

The Progressive Brief

The brief prepared by lawyers for the Progressive capitalized on the summary by Brennan, using the standards of certainty, immediacy, and gravity to test the government case.[27] On each topic they argued that the Government failed to meet the test.

The Government tried to bypass the obvious New York Times analogy by arguing that the Morland article was "fundamentally different."[28] The Morland article had, according to the Government, "current military significance" while the Pentagon Papers case was merely a historical record. Unfortunately for the Government, a documentary history of the New York Times case has been published by Arno Press, a New York Times company. In 1971 the Government virgorously argued that publication by the New York Times would directly cause the deaths of American prisoners of war, soldiers, agents of the CIA, and employees of other governments. Government arguments concerning current military significance included the rate of withdrawal of American soldiers, plans of SEATO allies, the freeing of American prisoners of war. In his dissent in the New York Times case Justice Blackman repeated the conclusion of a circuit-court judge that publicity could result in "the deaths of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies. . ." Blackman added that publication would prolong the war and further delay the freeing of United States prisoners. . . (403 U.S., at 762-63). In the New York Times case Burger and Blackman clearly accepted the Government's argument about current military significance. To the extent that in the Progressive case the Government relied on arguments assuming military significance of the H-bomb, the analogy seems valid.

1. Inevitable. The Progressive argued that the Government failed to sustain this requirement that the harm from publication of the Morland article would be virtually certain.[29] In the Pentagon Papers case the Government tried to establish a probability standard: that publication could result in immediate and irreparable harm to the nation's security. Even Chief Justice Burger wrote of the Government's failure to establish the "degree of certainty cases on prior restraint require."

In the case of the Morland article Judge Warren of the Federal District Court concluded by agreeing with the Government's argument that:

> the article could possibly provide sufficient information to allow a medium size nation to move faster in developing a hydrogen weapon. It could provide a ticket to by-pass blind alleys. It could accelerate the members [sic] of a candidate nation in the thermonuclear club [emphasis added].[30]

The Government, even in the view of the judge who granted the preliminary injunction, failed to meet the first test used by the Supreme Court.

2. Direct and Immediate. The Progressive brief[31] argued that "harm must be not only certain but imminent." In the analysis by the Progressive's lawyers six of the current members of the Court would apply the "direct and immediate" test in determining the admissability of prior restraint.

Affidavits presented by the Government concerning the Morland article did not even attempt to deal with the requirement that harm must be direct and immediate. Even if countries capable of producing a hydrogen bomb learned something from the Morland article that they did not already know (and this is contrary to the argument of the Progressive), the Government's strongest affidavits acknowledged that it would take years for other nations to develop the capability to produce a hydrogen bomb. In the words of the Progressive's lawyers:

> To reach its decision, the district court had to assume that countries with fission capability have not already acquired the fusion concepts in the Morland article, that countries acquiring a fusion capability by virtue of the Morland article would actually develop thermonuclear weapons, that countries with the knowledge of the fusion concepts have the immense resources required to apply them, and that the alleged difference in weapons development time would be material.[32]

In addition the Government's conduct in the Progressive case failed to support its claim of direct and immediate harm. DOE had a draft of the Morland article as early as February 16. On February 21 the Progressive mailed DOE the sketches and captions prepared for the article. Five days later the final draft of the article was mailed DOE. Not until March 1, after a call from the Progressive's editor, did DOE finally respond. Another week elapsed before DOE filed its action. Moreover even though DOE knew that the Progressive review system meant that several copies of the manuscript had been distributed, it made no effort to retrieve them until March 26, seventeen days after the district court granted the temporary restraining order.[33]

3. Grave and Irreparable. The most that the Government claimed or could claim in the case of the Morland article was that publication could increase nuclear weapons capabilities, "not the actual proliferation of nuclear weapons or the increased risk of their use." This capacity was "a risk of unspecified dimension in the indefinite future."[34] In fact, as the Progressive's brief pointed out, the Government request was unlike the prior restraint asked for in Nebraska Press Association v. Stuart which would end with the close of the trial, or that of the New York Times which would presumably end with the close of the war in Vietnam. The DOE request in the Progressive case "would be more than prior: it would be permanent restraint."[35]

> It would last at least until every nation in the world had acquired fusion weapon capability. Today, five nations have fusion weapons. If this case arose several years from now, perhaps 10 nations might have fusion weapons, and the government would request prior restraint on the theory that publication would help still other nations. Here, the protective order and the injunction do not terminate at a specific time or after the occurrence of a specified event. They will continue indefinitely until DOE decides, in its sole discretion, to permit publication. . . .

4. "Need to know." Instead of applying the New York Times standard the district court reached its decision on what it thought the public "needed to know." Judge Warren felt caught on the horns of a dilemma, "faced with a stark choice" between national security and the First Amendment. Judge Warren argued that "a mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is

extinguished and the right to publish becomes moot." His decision also offered a new and unusual test for First Amendment freedoms: "This Court can find no plausible reason why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on this issue."

In answer the Progressive's lawyers argued:

> The district court's balancing inquiry into the defendants' "need" to publish showed remarkable insensitivity to the First Amendment. When a judge decides what the press need to say and then balances that judgment against the government's national security claim it represents an extraordinary interference with the First Amendment, perhaps even more extraordinary than the restraint itself.[36]

The Third Issue

Did the government properly apply the Atomic Energy Act to the case of the Morland article? The Act itself was first passed in August of 1946, just a little more than a year after the bombing of Hiroshima and as the cold war was beginning. The American people believed that we alone had the "secret" of the atomic bomb, and Congress acted to protect it. The revised version of the act became law in 1954, when Senator Joseph McCarthy of Wisconsin was riding high. The revision preserved the mentality and much of the language of the original act.

1. "Will be utilized." The enforcement provision of the 1954 Atomic Energy Act of 1954 (Chapter 18, Section 224, part b) includes the phrase "will be utilized to injure the United States. . ." The Government argued only that the information of the Morland article could be utilized to bring about proliferation of nuclear fusion weapons and therefore damage the interests of the United States. The Progressive argued that "could" is not enough; that the act uses the term "will."[37]

2. "Reason to believe." Did the defendants have reason to believe (Section 224, part b) that publication of the Morland article "will be utilized to injure the United States or to secure an advantage to any foreign nation. . . " The language is that of the Atomic Energy Act. The Progressive has never been a great friend of the military establishment, but in the Government's case there was no imputation of treason and no accusation that Morland or any of the Progressive editors had access to Restricted Data. The New York Times (Pentagon Papers case) had classified documents; Morland, writing for the Progressive, did not. Morland relied on sources in the public domain. In a sense the preliminary injunction punished the defendants for being good investigative journalists.

3. "Intent to injure." Section 224, part a, of Chapter 18 of the Atomic Energy Act of 1954 forbids communication of Restricted Data "with intent to injure the United States" or with intent to secure "an advantage to any foreign nation. . ." The Progressive's lawyers argued in their brief that

> under the Government's construction of the Act, defendents had "reason to believe" publication would violate the Act because the government told them so. That construction would render the Act unconstitutional because it would force publishers, at their peril, to acquiesce in a government permit system regulating political speech. The government cannot impose on defendants a bad faith motive or state of mind. In publishing the article, the defendants intended to continue the public debate on nuclear weapons, nuclear proliferation and government secrecy. . . . If, in the process,

> they disclosed "secrets"--and the defendents contend they did not--it was not for the purpose of injuring the United States or providing an advantage to another nation but to inform the American public.[38]

In the Chicago Tribune (March 21) Erwin Knoll, editor of the Progressive, offered three reasons for publishing the Morland article. (1) It is a matter of common knowledge that "Nuclear materials are potentially dangerous to the environment and to the health and safety of workers in atomic plants and residents in nearby communities." (2) The United States "must make crucial decisions in the immediate future about such issues as arms control and continued nuclear testing." Unless we grant government infallibility, the people must be able to judge whether government policies are in the public interest. (3) The "huge, sophisticated industrial complex" required to build an H-bomb is enormously expensive. The taxpayers have a right to know how their dollars are spent.

4. Does the Government's interpretation of the Atomic Energy Act make it unconstitutionally vague?

First Amendment cases that reach the Supreme Court normally involve punishment after the fact. The Pentagon Papers case clearly involved a request by the Government for prior restraint against the New York Times and the Washington Post. After the Government's rebuff by a 6-3 majority in the Pentagon Papers case, one might expect the Government to back away from a second attempt.

The Progressive case, however, had numerous differences from that of the Times. The first is the relative size and prosperity of the Madison, Wisconsin, monthly and the nation's newspaper of record with "All the news that's fit to print." Second, although the nation was still at war in Vietnam at the time of the Pentagon Papers case, we were on our way out and the awesome power of nuclear fission or fusion had not been employed, despite some temptations to a President determined not to be the first to lose a war. Third, much of the information in the Pentagon Papers was historical, going back a quarter century and an acute embarrassment of the Government but with no possible analogy to the sailing dates of troop transports.[39]

Chapter 3 of the Atomic Energy Act of 1954 (Public Law 703, August 30, 1954) defines "Restricted Data" inclusively as anything relevant to atomic energy except for that "declassified or removed from the Restricted Data category. . . ." In the Government's argument

> all information, all knowledge--theoretical or practical --is classified automatically and remains so until the Government declassified it. A journalist's original work product, a private scientist's independent research, a university professor's deductive reasoning, all are "classified at birth," instantly characterized as "Restricted Data." Without the individual's knowledge, their communication is banned subject to the criminal sanctions of the Act. A professor cannot teach the principles of nuclear physics. . . without risking violation of the Act.[40]

In the words of the Progressive's lawyers, "There can be no more chilling restraint on the free interchange of ideas, free speech, and a free press. Those who must conduct their day-to-day activities under the threat of the Act's criminal sanctions may decide not to speak, not to publish, for fear of prosecution."[41]

In its review of the case by Robert Friedman, the Columbia Journalism Review compared the Atomic Energy Act's information control system to the exact system of prior restraint that those who drafted the First Amendment sought to prevent--the English press-licensing laws. "Originally designed to control the

spread of heretical writings, and later broadened to encompass all political tracts as well, the laws required that every manuscript intended for publication be submitted to church or crown censors. To publish without their imprimatur was to risk one's liberty."[42] Like the English licensing laws, the Act "gave birth to a bureaucracy of censorship. A nuclear priesthood took over the role once played by an ecclesiastical elite and Restricted Data became the new heresy. To publish without the A.E.C.'s imprimatur was to risk a lengthy jail term; to be safe, one had to submit."

The Issue of Practicality

Could the Government succeed in restricting publication of the Morland article or similar articles? This fourth issue is suggested in the opinion of the court in Nebraska Press Association (427 U.S., at 565). Chief Justice Burger suggested: "We must also assess the probable efficacy of prior restraint on publication as a workable method of protecting Simant's right to a fair trial, and we cannot ignore the reality of the problems of managing and enforcing pretrial restraining orders." Nebraska Press Association dealt with prior restraint of pretrial publicity, certainly not the same issue as information concerning the H-bomb. Because the brief for the Progressive was liberally censored by the Government (the word "Deleted" appears 26 times in the published brief including five entire pages), it is impossible to be sure that this issue was never raised by Progressive's lawyers. It remains clear, however, that the same concepts to which the Government objected in the Morland article had been made public at least twice before. The first was in the declassified document UCRL-5280, discovered by Dmitri Rotow on the open shelves in Los Alamos. Rather than produce the document the Government stipulated that it did indeed contain the same three concepts to which DOE objected in the Morland article.[43] The Government's only explanation was that the document had been hastily or wrongfully declassified. The second was in Fusion magazine for March 1979.

The calendar rolled inexorably toward the September 10 date set by the Circuit Court of Appeals in Chicago. The Government must have known that Howard Morland was not the only one concerned about atomic energy and able to put two and two together and get four. One man who followed the Progressive case with intense interest was a California nuclear weapons hobbyist named Charles Hansen. A Palo Alto computer programmer, Hansen had been writing a book on nuclear weapons for several years. During the spring he needled the Government with an "H-bomb design contest." The first design to be classified by DOE would be the winner. John Griffin, chief classification officer for DOE, failed to see the humor and threatened to call in the FBI.[44]

Climaxing a rather complicated series of events, several Argonne scientists wrote Senator John Glenn, asking that he investigate the DOE. The DOE classified their letter. Hansen got hold of this letter, made copies, and distributed them far and wide. The Daily Californian and six other college newspapers published it.

Then Hansen wrote Senator Charles Percy of Illinois, a member of the Senate subcommittee charged with overseeing national security matters. Eighteen pages of single-spaced type opened with charges that three Government experts in atomic weapons--Edward Teller, George Rathjens of M.I.T., and Theodore Taylor of Princeton--should be charged with spilling atomic secrets, not the Progressive. Most of Hansen's letter, however, reviewed some of the theory that led to the concepts at issue in the Morland case. Hansen's "brief history" fitted together Teller's Encyclopedia Americana article, an amicus brief from the Fusion Society, an article from Fusion magazine, and other unclassified sources. For good measure he drew a diagram using a tuna fish can and assorted jar lids.

Hansen sent copies to half a dozen newspapers and the DOE. On August 30, the Peninsula Times-Tribune, his hometown newspaper (Palo Alto), printed a story about his charges and reproduced his crude diagram. The Oakland Tribune, San Jose Mercury News, Milwaukee Sentinel, and Wall Street Journal wondered if they had a story. Editors of the Daily Californian also wondered. They had an

answer on September 12, when they learned that the Hansen letter had been classified "Secret/Restricted Data." That same day Jerry Fass, a Milwaukee nuclear-weapons hobbyist, gave the Milwaukee Sentinel another successful description of the "H-bomb secret."

For a few days DOE officials raced around trying to plug the holes in its security dike. Afraid that the Daily Californian would print the Hansen letter, the Department went into Federal District Court in San Francisco on Saturday evening, September 15, to obtain an injunction against the student newspaper. But even the DOE could not be everywhere at once. Two thousand miles away, the Press Connection of Madison, Wisconsin, printed a special eight-page Sunday edition (September 16), most of it devoted to the Hansen letter. Begun during a newspaper strike in Madison, the Press Connection was an alternative newspaper of relatively small circulation.[45] However, the mighty Chicago Tribune then threatened to publish important portions of the letter in its Thursday, September 20, edition unless enjoined. The Tribune eventually did just that. Thus on September 17 the Justice Department announced that it would seek dismissal of the cases against the Daily Californian and the Progressive. On September 28 the Appeals Court vacated Judge Warren's injunction and left the Progressive free to publish Howard Morland's article in its issue for November. In seeking dismissal of the charges the Justice Department announced an investigation by its criminal division to determine whether any prosecution was appropriate. The DOE leaked information that some of its own scientists were under investigation.

Finale

For practical purposes, the case of the United States versus the Progressive ended with the publication of Howard Morland's article in November, 1979. Morland's point--that secrecy fails to deter foreign spies but does hinder public understanding of nuclear policy issues--may or may not have been well made or understood by Progressive readers. But the Government found this attempt at censorship impractical and gave up.[46]

Two sticking points kept the case dragging through the courts for nearly another year until Judge Warren of Milwaukee finally closed the books on the case September 4, 1980, declaring that he could find neither winners nor losers. The first continuing disagreement concerned the maintenance of secrecy over material submitted to the courts, including dozens of affidavits, exhibits, and briefs submitted by Morland or the Progressive. The final compromise allowed most of the hidden material to be made public.

It is interesting to note that Government officials most determined to preserve this secrecy were not the weapons engineers in DOE who once claimed that the Morland Article would lead to nuclear proliferation. Instead, the diplomats of the State Department and Arms Control and Disarmament Agency feared that if the proliferation of nuclear information by the Government (obvious from the court record) were made public, it would embarrass State and Defense.

The second problem concerned the Government's threat of criminal prosecution for its own scientific consultants and others for revealing H-bomb secrets. The Government abandoned this position at the last moment when in early September Justice announced that there would be no such prosecutions. The Progressive's lawyers had insisted on this condition before agreeing to close the books on the case.

The Progressive published the article but wound up with over $250,000 in legal costs and a $50,000 debt. Since Government lawyers do not charge by the hour, it is impossible to evaluate costs borne by the public, but they must have been high. The Progressive got lots of attention but no returns of money, circulation, advertising, or any of the necessities of an impoverished non-profit publication. Defense, State, and Justice were foiled in their attempt to keep the lid on further publication of the principles of hydrogen bomb design. Judge Warren refused, however, to vacate his opinion of March 26: "In view of the

sparsity of opinions in this area, this Court believes that it is in the best interests of justice and furtherance of the development of the law that its opinions stand and be available for any Court that in the future might be presented with a similar issue." Thus this judicially non-binding but menacing opinion found its way into case law. In addition the Government succeeded by its precipitous withdrawal in avoiding a constitutional test of the "born secret" provisions of the Atomic Energy Acts of 1946 and 1954. It is true, however, that for the first time since 1954--and as a result of the Progressive case--Congress is taking a careful look at the Atomic Energy Act. Perhaps that and the preservation of the First Amendment are enough to repay the Progressive and its many friends and allies for their sacrifices of time, energy, and money.

Endnotes

[1]The fullest account of events of this clash between Government and the press is in the pages of the Progressive itself, especially issues for May and November, 1979, volume 43, number 5 and 11. In the May issue Erwin Knoll, Progressive editor, wrote "Born Secret: The story behind the H-bomb article we're not allowed to print," pp. 12-22. In the November issue his article was entitled: "Wrestling with leviathan: The Progressive knew it would win," pp. 24-28. Michael Macdonald Mooney wrote up the Progressive case for Harper's in March, 1980 (Volume 260, Number 1558, pp. 35-44). "Right Conduct' for a 'Free Press'" The story in Columbia Journalism Review is by Robert Friedman, "The Unites States v. The Progressive," XVIII July-August 1979, No. 2, Cynthia Bolbach wrote "'Born Classified': The Lessons of the 'Progressive' Case" for Christian Century, XCVI October 24, 1979, No. 34, pp. 1033-1038.

[2]Howard Morland, "The H-bomb secret: To know how is to ask why," Progressive, November 1979, pp. 14-15.

[3]Knoll, "Born Secret," pp. 14-16.

[4]Affidavits for both the plaintiff (Government) and defense (Progressive), are printed in the May Progressive, pages 36-40. All dates are 1979 unless otherwise indicated.

[5]"The Hydrogen Bomb: II," Vol. 182, No. 4, pages 18-23.

[6]Account is from Mooney, "Right Conduct," p. 40.

[7]Day's story is entitled "Scientists of conscience: How The Progressive managed to find a few," May Progressive, pp. 28-32.

[8]Affidavits are in the May Progressive, pages 36-40.

[9]Friedman, p. 31.

[10]Friedman, p. 34. Samuel H. Day; "The other nuclear weapons club: How the H-Bomb amateurs did their thing," November Progressive, pp. 32-35. See also Washington Post article by Mortan Mintz, "Nuclear Library Shuts Doors to Block Researcher," May 12, A 8, Column 1.

[11]Friedman, p. 35

[12]Knoll, "Born Secret," p. 14.

[13]"My Turn: Telling All," Newsweek, April 9, p. 14-15.

[14]Knoll, "Born Secret," p. 20.

[15]Knoll, "Wrestling with leviathan," p. 24.

[16]Knoll, "Wrestling with leviathan," p. 27.

[17]Knoll, "Born Secret," p. 18.

[18]Bolbach, p. 1034. Bolbach quotes Judge Warren at length.

[19]Fusion magazine published an unsigned article, "The Secret of Laser Fusion" in March. In a special note Fusion said: "we fully expect that with the appearance of this issue . . . Energy Secretary James Schlesinger and his staff will begin circulating the story--if not attempting legal prosecution--that the information. . . is classified. Therefore, we want to make it clear that this article is based on information made public by the Soviet Union and readily available in Soviet and other international scientific circles, as well as upon information contained in a scientific paper published in Bernhard Riemann in 1859." The Fusion Energy Society introduced an unsolicited friend-of-the-court brief in the Progressive case. Government documents UCRL-4725 and UCRL-5280 contained the same "secrets" as the Morland article; rather than produce them the Government stipulated this to be true.

[20]Knoll, "Wrestling with leviathan," p. 25.

[21]New York Times Co. v. Unites States, 403 U.W. 713.

[22]Ibid., p. 750.

[23]Day, "Scientists of conscience."

[24]Schenck v. United States, 249 U.S. 47.52.

[25]283 U.S. 697, at 716.

[26]New York Times Co. v. Unites States, 403 U.S. 713, p. 714.

[27]Brief of Appellant, The Progressive, Inc., in the Unites States Court of Appeals for the Seventh Circuit. United States of America v. The Progressive, Inc., Erwin Knoll, Samuel Day, Jr., and Howard Morland. Hereinafter cited as Brief.

[28]Brief, p. 35.

[29]Brief, p. 38-40.

[30]Brief, p. 40.

[31]Brief, p. 40.

[32]Brief, p. 42-43.

[33]Brief, p. 43-44.

[34]Brief, p. 45-46.

[35]Brief, p. 46.

[36]Brief, p. 49.

[37]Brief, p. 53.

[38]Brief, p. 57.

[39]Bolbach, p. 1036.

[40]Brief, p. 66.

[41]*Brief*, p. 66.

[42]Page 29.

[43]Friedman, pp. 34,35. *Brief*, pp. 21,22.

[44]Day, "The other nuclear weapons club," p. 33. Mooney also reviews the Hansen contribution, pp. 43,44.

[45]The *Press Connection* died of malnutrition (economic) in January, 1980.

[46]The *Progressive* summarized its views of "End of the H-bomb case" in its issue for November 1980, p. 8.

ATTITUDES TOWARD FREE SPEECH: TRENDS, MEASUREMENT AND INDIVIDUAL DIFFERENCE CONSIDERATIONS

William I. Gorden
Dominic A. Infante
Kent State University

After student demonstrations against the U.S. incursion into Cambodia, the dispersal by Ohio National Guardsmen of a peaceful rally protesting their presence, and the killing of four and wounding of nine students by Ohio National Guardsmen stationed at Kent State University on May 4, 1970, Kent State became a national symbol of radical protest.[1] Such a label was not justified. A large sampling of student opinion toward demonstration and other kinds of free speech activity by Osborne and Gorden in the Fall of 1969, only a few months before the shootings, provided a picture of a conservative student body.[2] Sizeable numbers, for example, were of the opinion that controversial speakers should be required to submit a copy of their speeches to the university administration (37%), that those who occupy buildings should be expelled (65%), and that students who participate in antigovernment demonstrations should have their government loans denied (61%). Add to these students who held conservative opinions on matters that affected student financial interest, those who were neutral in opinion and one finds only a minority who could be labeled liberal or radical.

Early in the 1970's Barbour and Goldberg suggested that attitudes toward freedom of speech have grown more restrictive.[3] A possible explanation for this tendency is that when the level of stress in society is high for a variety of political and economic reasons, people desire strong, unequivocal leadership and are less tolerant of dissidence. When the social climate is threatening, an authoritarian style of leadership may be preferred.[4] Allegiance to principles of free speech may be lower when people want clear direction on how to reduce perceived threat. A social climate where free speech is pervasive may itself be threatening and anxiety producing. Views which challenge the status quo, radical ideas, venting frustrations, protesting injustices, etc., all have the potential for arousing anxiety in receivers. Activation theory suggests that people resist further arousal when their level of arousal is already high.[5] Thus, when the level of anxiety in society is high, there may be a resistance to further anxiety, especially the sources of it such as free speech.

This notion would explain the restrictive attitudes toward free speech observed in 1969 by Osborne and Gorden with their sample of college students. The level of stress at Kent State University, as at most U.S. colleges, was especially high. There was a good deal of civil unrest, mainly from the anti-war movement, but also from the civil rights and women's movement. In terms of activation level, the subjects in the Osborne and Gorden survey may have been reflecting a desire to reduce stress. To inhibit free expression may have been seen as a means to quiet the social climate.

The 60s and early 70s indeed were stressful to the university. The Scranton Commission said, "The crisis on American Campuses has no parallel in the history of the nation," and "Much of the nation is so polarized that on many campuses a major domestic conflict or an unpopular initiative in foreign policy could trigger violent protest, and in its wake, counter-violence and repression."[6] Turmoil, however, was not pervasive; many campuses never suffered even a tremor. But during 1968 and 1969, scarcely a week went by without major student upheaval

somewhere in the United States.[7] Business as usual became unthinkable on many campuses. However, the majority of the protest activities were embraced by many more moderate than radical students and consequently the protests were overwhelmingly peaceful, though by no means, invariably.[8]

The students at Kent State had an activist minority. Skirmishes with university authorities were frequent. In 1969, one hundred students were arrested while protesting in the Music and Speech Building. Community and student opinion for the most part looked with great disfavor upon the demonstrators.

The 60s provided grist for the mill of the sociologists, political scientists, and psychologists. Seymour Lipset explained that in order to understand why the passive postwar generation of the fifties was replaced by one that contained an activist minority of the "enraged," one must see the cold war mentality that dampened intellectual controversy.[9] Zbigniew Brzezinski charged the student movement with being "essentially counter-revolutionary;" they were "modern Luddites opposed to technological progress" because they had "no role to play in the new technitronic society."[10] Erik Erikson explicated the discontent of youth in terms of the Oedipal drive to emasculate authority, an outgrowth of prolonged adolesence, and identity diffusion and confusion."[11] Marxists asserted that society was forcing increasing numbers of youth to go to the university to acquire specialized skills which advanced industrial societies required. Thus students were exploited, alienated members of a powerless sector.[12]

The activism of one class did seem to arouse reaction from those in other strata of this society. The parents of protestors were generally liberal or even radical, and, according to David Riesman, "activists were acting on behalf of parental ideas . . . . Similarly, some children of working-class parents from labor-union rather than the 'new politics' wing of the Democratic Party turned to George Wallace as expressing their blend of populism and cultural conservatism, and hatred for the protestors who rejected the privileges of elite education which workingclass people only wished they could gain."[13]

In comparison to the turmoil in 1969, the level of stress and anxiety on college campuses in 1979, ten years after the Osborne and Gorden survey, was low. College students in the late 1970's have been characterized as apathetic, more fun-loving, which probably indicates a relatively low level of stress. The students of the late seventies were different from those of ten years earlier. Unlike their predecessors of the 1960's the students of this generation have "near total consumer sovereignty."[14] The student is more the consumer than the product of the college marketplace and therefore have realized his/her power through such tangibles as grade inflation. Activism, when it rarely surfaced, was directed against apartheid in South Africa. Average scores on the college entrance tests were considerably lower. Students were "now taking their studies more seriously . . . largely for vocational reasons," but Reisman asserts that "large scale surveys and more limited intensive studies indicate that attitudes have not grown more conservative.[15]

In terms of activation level and tolerance of authoritarianism, then, speculation would be that attitudes toward free speech on the college campus were more permissive in 1979 than 1969. In light of this speculation, the first purpose of this investigation was to discover if student attitudes toward freedom of speech at Kent State University were more favorable toward First Amendment issues during periods of campus unrest in 1969 or the relatively quiet period of 1979. A second purpose of the study was to determine whether an instrument to measure attitudes toward free speech reliably and validly could be derived from the pool of items used by Osborne and Gorden. If in fact attitudes toward free speech do fluctuate according to the social climate, it is necessary to have a reliable and valid instrument to study the trends.

Conclusions about the American public's degree of belief in freedom of speech, and particularly of trends, are difficult to reach because few polls have addressed the issue. Few have asked enough questions, and almost none have moni-

tored the public using the same questions at regular intervals. Moreover, national polls covering free speech usually have been taken during times of special threats to civil liberties, such as wartime and the McCarthy era. The total number of questions asked by all the leading pollsters (CBS News, Gallup, Harris, Minnesota Poll, National Opinion Research Center, Office of Public Opinion Research, Roper, and Survey Research Center) between 1936 and 1970 was only 44, and in any of seven time periods no more than 10.[16]

Although lack of uniformity makes conclusions difficult, some trends are evident. The maximum percentage believing in freedom of speech for extremists before 1950 was 49%, in 1950-60 was 29%, and between 1960 to 1970 was 21%.[17] Remmers and Franklyn's studies of high school youth, which in a small way tapped opinions regarding freedom of press and speech, found a similar drop in support for free speech from 1951 to 1960, especially when applied to foreigners and minorities' rights of freedom of speech, press, and peaceable assembly.[18]

The few available longitudinal studies of particular populations provide valuable data to the social scientists.[19] The classic Middletown study in 1924,[20] which included a few items relevant to free speech was replicated in 1977.[21] This replication enabled the finding that some of the religious, political, and social attitudes measured of high school youth just after World War I have persisted, but unabashed patriotism moderated and support for free speech increased. In 1924, 92% answered "True" to "The United States is unquestionably the best country in the world," as compared to 1977 when 78% answered in the affirmative. In 1924, 61% answered "True" to "Every good citizen should act according to the following statement: My Country-- right or wrong." In 1977 that percentage was 49%. The percent answering "True" to the item "A citizen of the United States should be allowed to say anything he pleases, even to advocate violent revolution, if he does no violent act himself" rose from 20% in 1924 to 47% in 1977. This longest of longitudinal studies does not provide enough data to draw many conclusions, but it is the kind of study necessary if trends are to be studied and activism theory is to be tested. To date, longitudinal studies of civil liberties using a sufficient body of items are almost non-existent.

A third purpose of the study was to determine whether characteristics of the individual can explain individual differences in attitudes towards free speech. In other words, the assumption was that even if the amount of stress in society explains variance in free speech attitudes, additional variance should be explained by individual differences.

Attitudes toward free speech may be manifestations of more general attitudes toward communication. Hart, Carlson, and Eadie conceptualized three attitudes toward encoding messages: rhetorical sensitivity, noble self, and rhetorical reflector.[22] Characteristics of the attitude of rhetorical sensitivity are: acceptance of personal complexity, avoidance of communicative rigidity, interaction consciousness, appreciation of the communicability of ideas, and tolerance for inventional searching.[23] Hart and Burks describe the rhetorically sensitive individual as "an undulating, fluctuating entity, always unsure, continually weighing.[24]

Springing from the theoretical work of Donald Darnell and Wayne Brockriede,[25] Hart, Carlson, and Eadie position the rhetorically sensitive person between the noble self at the one extreme and rhetorical reflector at the other, as measured by a scale they titled Rhetsen. Darnell and Brockriede defined the noble selves as persons who "see any variation from their personal norms as hypocritical, as a denial of integrity, as a cardinal sin, and rhetorical reflectors as those who have no self to call their own. For each person and for each occasion they present a new self."[26]

Our speculation was that persons who are most committed to free speech would be more likely noble selves, next most apt to be rhetorically sensitive and least likely to be rhetorical reflectors. Our reasoning for this speculation was based upon the notion that those most committed to free speech believe in absolutes, unequivocality and authenticity. Such uncompromising values as these

should be manifest in the way noble selves see their communication. In contrast those who are moderate in their attitudes regarding freedom of speech are likely to see themselves as flexible, empathic, open minded and able to influence others. In short, they see themselves as rhetorically sensitive. Those who are anti-freedom and restrictive regarding speech should desire orderly harmonious relationships that are typical of pure rhetorical reflectors.

We also reasoned that beliefs about free speech have political implications. Although Rhetsen essentially taps the interpersonal communicative dimension, its authors discovered that pure types RS, NS, and RR presented distinct socio-political positions. Hart et al. emphasized that rhetorical sensitivity "may be nurtured in certain sociocultural or better, sociocommunicative environments" and Hart et al. profiles the rhetorically sensitive as more likely to be male, competitive, richer, from professional upbringing, Republican or Independent, and low in ethnic identification.[27] "The overall pattern," they explain, "seems to be that rhetorical sensitivity is a white middle-class, third-generation construct."[28] The noble self and rhetorical reflectors, interpersonal opposites, were also found to be different demographically and politically. The noble self, was found "closely aligned to the classic liberal position" and the rhetorical reflector as "distinctively conservative." Gallup in 1969, at the peak time of protests against the Southeast Asian War found that most college demonstrators stated they were liberal and most non-demonstrators classified themselves as conservatives.[29] Several studies have explored the relationships of free speech attitudes to such predispositions as open-mindedness, power, hostility,[30] values,[31] various personality characteristics,[32] and anxiety,[33] but to date no study has been conducted of the relationship between free speech attitudes and rhetorical style.

In review, the three purposes of our study were (1) to discover if activation theory explains some of the restrictive attitudes toward free speech, (2) to develop a reliable and valid free speech scale, and (3) to ascertain if differences in free speech attitudes might be partially explained by difference in predispositions toward interpersonal rhetorical communication. The benefits of this three pronged research would be to provide greater understanding of how the times impact upon attitude activation, to augment very sparce longitudinal data on free speech attitudes and to make a beginning of relating socio-political attitudes to communication predispositions.

Method

Subjects.

Subjects in the study were 232 students enrolled in introductory and upper level communication courses at Kent State University, during the fall semester of 1979, almost exactly ten years after the Osborne and Gorden survey.[34] The students participated in order to fulfill a course research requirement.

Procedures.

Most subjects completed the two scales described below during a regularly scheduled class session. Seventy of the 232 subjects were administered the scales individually. The subjects were told the study was investigating opinions about communication in our society and perception of individual communication behaviors. The Rhetorical Sensitivity Scale (Rhetsen)[35] contains 40 items and measures the individual's Noble Self, Rhetorical Sensitivity, and Rhetorical Reflector tendencies in communication. The internal consistency and test-retest reliabilities reported by Hart, Carlson, and Eadie for the scale were generally high.[36] Hart, Carlson, and Eadie presented validity evidence for the scale and demonstrated that the scale differentiates between people on the basis of a wide variety of demographic and social variables.[37] The means and and standard deviations in the present study were very similar to those reported by Hart, Carlson, and Eadie for their national sample of 3023 subjects. The cut-off points suggested by Hart, Carlson, and Eadie[38] for identifying pure Noble

Selves, Rhetorical Sensitives, and Rhetorical Reflectors were followed in the present study.

The subjects also completed a 34-item instrument for measuring attitudes toward freedom of speech. Twenty-three of the items were taken from the 31-item instrument developed by Osborne and Gorden for their 1969 survey.[39] The eight items eliminated from the earlier instrument were either outdated or were items that did not discriminate between the top and bottom quartiles in the Osborne and Gorden study. The 11 items added for the present study were comprised of revisions of some of the items which did not discriminate in the Osborne and Gorden study, two global items about free speech, and items about current free speech issues. A Likert-type format was used for the instrument (a five-point scale which spanned from "strongly agree" to "strongly disagree").

Results

The first analysis considered the trend dimension of the study: Have attitudes toward free speech changed during the period from 1969 to 1979? For our 1979 survey, 23 of the 34 free speech items in our scale were identical to those from the 1969 Osborne and Gorden survey.[40] The 1969 sample (N=741) was composed of students enrolled in introductory communication courses at the same university at which the 1979 sample (N=232) was taken. The two samples were compared on each of the 23 free speech items. Alpha was set at .05. The results are presented in Table 1.

Table 1

COMPARISON OF 1979 AND 1969 ATTITUDES TOWARD FREE SPEECH

Item[a]	1979 Sample[b]	1969 Sample[b]	t
1	3.25	3.04	2.10*
2	2.74	2.82	- .82
3	3.49	3.23	2.77*
5	3.89	3.98	-1.13
8	2.65	2.41	3.00*
9	3.11	3.04	.78
10	3.68	3.24	4.89*
11	3.28	2.39	9.89*
12	2.29	1.77	5.20*
14	2.86	2.16	7.00*
15	4.20	3.91	4.14*
18	3.38	3.58	-2.50*
19	3.65	2.51	12.67*
20	3.18	2.94	3.00*
21	3.19	3.06	1.44
22	3.41	3.27	1.56
23	2.57	2.41	2.00*
24	3.03	2.75	3.11*
25	3.00	2.40	6.00*
26	3.31	3.02	3.22*
28	3.66	3.02	7.11*
30	3.88	3.35	5.89*
31	3.32	2.55	8.56*

a = For the wording of each item see the Osborne and Gorden article

b = Five-point scale, the higher the mean, the more favorable the attitude

* $p < .05$

The two samples differed significantly on 18 of the 23 items. The alpha percentage for these results was only 6%.[41] This is the proportion of results likely to be due to chance. Thus, 94% of the results observed in this analysis probably are due to nonchance effects. For 17 of those items the 1979 sample had the more favorable attitudes toward free speech. The 1969 sample had more favorable attitudes toward free speech on only one item. Thus, on the basis of this trend data, it seems apparent that attitudes toward freedom of speech became more favorable from 1969 to 1979. This result supports the speculation that attitudes toward free speech become more restrictive in a stressful social climate.

The second phase of our analysis considered whether an instrument to measure attitudes toward freedom of speech could be derived from the 232 subjects' responses to the 34 free speech items. The correlation matrix was first factor analyzed using the principal factors method followed by a varimax rotation to simple factor structure. Eleven factors with eigenvalues greater than 1.0 were rotated. The solution revealed a very weak factor structure for the set of 34 items. Using the criterion that an item must load .50 or more on the primary factor and no more than .30 on secondary factors, it was determined that four items loaded on the first factor and two, one or none on the remaining factors. Cronbach's coefficient alpha[42] was then computed for the 34 items and yielded a value of .80, indicating a rather high level of internal consistency in subjects' responses to the items. This result led us to conclude that although subjects responded to freedom of speech issues in a complex differentiated manner revealing no small number of constructs to summarize attitudes toward free speech, their responses to the 34 items in general were consistent enough to consider the set a global measure of attitudes toward free speech. In order to reduce the set of 34 items to a shorter version that would represent economy in administration time and scoring, we selected 20 items with the highest item-total r's, with the restriction that the eight positively worded items would be retained to avoid a preponderance of negatively worded items. Cronbach's alpha for this 20-item set was .81. Factor analyses of the 20-item scale using varimax and then oblique rotations revealed very weak factor structures, and we again concluded the set of items constituted a more global measure of attitudes toward free speech. The 20-item scale is presented in Table 2.

In order to assess the criterion group validity of the scale subjects in the sample who completed the scale at the beginning of an elective course in freedom of speech (N=22) were compared with the remainder of the sample (N=210). We reasoned that students who elect a course in freedom of speech, presumably because of interest in the topic, as a group have more favorable initial attitudes toward free speech than other students. This assumption was supported. The mean on the 20-item scale for the free speech class was 74.18, whereas the mean for the rest of the sample was 66.05, $t = 3.29$, $p < .001$, $df = 230$. This evidence of criterion group validity together with apparent face validity of the items and acceptable internal consistency suggests the scale may be an adequate measure of attitudes toward free speech.

Construct validity evidence is especially important in establishing the validity of a scale. Construct validity involves placing the construct measured in an appropriate nomological network and deriving hypotheses, which, if supported, verify the scale used to measure the construct and also the nomological network.[43] Our third analysis may be considered relevant to the issue of construct validity. A hypothesis was derived by placing the attitudes toward free speech construct in a nomological network pertaining to attitudes toward communication and rhetorical sensitivity.

For the third analysis "pure" Rhetorical Sensitives (N=56), Noble Selves (N=51), and Rhetorical Reflectors (N=18) were identified according to the criteria set by Hart, Carlson, and Eadie.[44] The Hypothesis--that Noble Selves will have the most favorable attitudes, Rhetorical Reflectors the least favorable attitudes, with Rhetorical Sensitives intermediate--was tested by a one-way analysis of variance with scores on the 20-item free speech scale as the dependent variable. The respective means for Noble Selfs, Rhetorical Sensitives and

Table 2

ATTITUDES TOWARD FREE SPEECH QUESTIONNAIRE

This survey is designed to measure attitudes toward communication in our society. Indicate your degree of agreement or disagreement with each of the following statements. There are no right or wrong answers, so please respond frankly. The scale is: SA = Strongly Agree; A = Agree, U = Undecided, D = Disagree, SD = Strongly Disagree.

1. Those who advocate violent overthrow of our government and its replacement with communism should not be allowed to speak on campus.

*2. Disrespectful behavior toward the flag should be an acceptable form of protest.

3. Police are justified in stopping a speaker who provokes a crowd with hostile remarks.

4. Controversial speakers, before they appear on campus, should be required to submit a copy of their speech to the administration.

*5. Instructors should not disclose anything a student said in class to prospective employers or government investigators unless the student requests him to do so.

6. The police have every right to use wiretaps to listen in on private conversations when they feel some crime is involved.

7. When a draft system is in effect, persons who burn their draft cards should be punished.

*8. Those who wish to distribute handbills from door to door in the residence halls should be allowed to do so.

9. Demonstrators who occupy campus buildings should be expelled.

*10. Teachers should express their personal opinions on controversial issues in the classroom.

11. The university has the right to search dorm rooms when they suspect students of being involved with drugs.

*12. No work, however pornographic or obscene, should be banned from the campus library.

13. Government loans should be unavailable to students who participate in antigovernment demonstrations.

14. The university should prevent the showing of obscene, revolutionary, or communist propaganda films on campus.

*15. Nudity should be acceptable in a university theatre.

16. Articles in the campus newspaper likely to hurt the image of the university should be screened out by a faculty advisor.

*17. No law should abridge freedom of press, television, speech or any form of communication.

18. Persons who counsel draft resistance should be convicted of treason.

*19. Freedom of speech should be absolute.

20. Police should have greater power to search and seize suspected criminals.

---

* Items worded pro free speech. Depending on the scoring system, the scores for either the pro or con items should be reversed.

Rhetorical Reflectors were 69.80, 67.23, and 61.61. The F-test was 4.50, $p < .02$, $df = 2/122$. Duncan's multiple range test revealed that Rhetorical Reflector's attitudes toward free speech were significantly less favorable than the attitudes of Nobel Selves and Rhetorical Sensitives. Although the mean for Rhetorical Sensitives was, as predicted, less than that of the Noble Selves, the difference was not significant. Thus the hypothesis was partially supported.

Discussion

The data reported in this article suggest attitudes toward free speech may fluctuate according to the degree of stress or anxiety in the social climate. When the level of stress is high, people may reject stimuli that would raise the level of stress even higher. The exercise of free speech may be viewed as inherently stressful. People are exposed to positions and ideas that are threatening to the status quo. Activation theory that would predict such threat would be tolerated less when arousal is already high. If we assume a less stressful social climate on the Kent State University campus in 1979 than 1969, then the data fit rather well into an activation theory interpretation. For 17 of the 23 free speech issues surveyed by Osborne and Gorden in 1969, our 1979 sample had more favorable attitudes.

Our data also fit with the complementary idea that in times of stress and turmoil people prefer a more authoritarian style of leadership. Free speech is more restricted with authoritarian leadership. A preference for less free speech may also be a vote for more of an autocracy. The 1969 results in the Osborne and Gorden study may reflect such a tendency.

If attitudes toward free speech do fluctuate according to good times and bad, it would seem necessary to have a valid and reliable instrument for monitoring attitudes toward free speech. Such measurement would represent an indirect index of the amount of stress in the social climate, and a direct index of the public's commitment to the First Amendment. The 20-item scale derived in this article would seem functional in this respect. The reliability was high. There was apparent face and content validity. Evidence was presented as to criterion group validity and also construct validity. With some very minor wording changes the instrument would be appropriate for non-college samples. A more standard scale for measuring attitudes toward free speech would be desirable, for as we observed earlier, public opinion research on free speech has not only been spotty but also has used a wide array of items that hampers trend analyses.

Endnotes

[1]William W. Scranton, Report of The President's Commission, Campus Unrest (Washington, D.C., 1970), p. 1; Joe Eszterhas and Michael D. Roberts, 13 Seconds (New York: Dodd, Mead and Co., 1970); Ottavio M. Casale and Louis Paskoff, The Kent Affair Documents and Interpretations (Boston: Houghton Mifflin Co., 1971); I.F. Stone, The Killings of Kent State (New York: Vintage Books, 1971); James A. Michener, Kent State What Happened and Why (New York: Random House, 1971).

[2]Wilbur J. Osborne and William I. Gorden, "A Freedom of Speech Survey of Student Opinion in a Basic Speech Course," Free Speech Yearbook (New York: Speech Communication Association, 1970), pp. 52-62.

[3]Alton Barbour and Alvin Goldberg, "Survey Research in Free Speech Attitudes," Free Speech Yearbook (New York: Speech Communication Association, 1971), pp. 28-35.

[4]Bernard Berelson and Gary A. Steiner, Human Behavior (New York: Harcourt Brace and World, 1964), p. 616, reads "There is always a tendency to achieve stability after a period of sharp social change. . . ." Berelson and Steiner explain this finding as a need to reestablish order and security after social disruption. Marie Johoda and Stuart W. Cook, "Ideological Compliance as a Social-Psychological Process," Totalitarianism (Cambridge, Mass.: Harvard University Press, 1954), pp. 203-230. Jahoda and Cook explain the socio-psychological need that causes a society to embrace repressive measures: "The fear of an enemy from within is a permanent concern of totalitarian regimes."

[5]Donald W. Fiske and Salvatore R. Maddi, "A Conceptual Framework," Functions of Varied Experience, eds. Donald W. Fiske and Salvatore R. Maddi (Homewood, Ill.: Dorsey Press, 1961), pp. 11-56.

[6]Scranton Commission, pp. 1 & 2.

[7]David Riesman, "Ten Years On," New Republic, 179 (1978) 13-17, and John R. Searle, The Campus War (New York: World Publishing Co., 1971), p. 2.

[8]Richard E. Peterson and John A. Bilorvsky, May 1970: The Campus Aftermath of Kent State (Berkeley, Calif.: Carnegie Commission on Higher Education, 1971), p. 1; also see William I. Gorden and Robert Kelley, "A Look at the Fire Symbol Before and After May 4, 1970," Free Speech Yearbook (New York: Speech Communication Association, 1974), pp. 18-28.

[9]Seymour Martin Lipset, Passion and Politics: Student Activism in America (Boston: Little, Brown, & Co., 1971), pp. 7-8.

[10]Zbigniew Brzezinski, "Revolution and Counter-Revolution," in Stress and Campus Response, G. Gary Smith, ed. (San Francisco: Jossey-Bass, 1968), pp. 447-453.

[11]Erik H. Erikson, "Reflections on the Dissent of Contemporary Youth," in The Embattled University, eds. Stephen R. Graubard and Geno A. Ballotti (New York: George Braziller, 1970), pp. 154-176.

[12]John and Margaret Rowntree, "The Political Economy of Youth," Our Generation, 6 (1968), 173.

[13]Riesman, pp. 13-17.

[14]Ibid.

[15]Ibid.

[16]Hazel Erskine, "The Polls: Freedom of Speech," Public Opinion Quarterly, 34 (1970), 438-495.

[17]Ibid.

[18]H.H. Remmers, and R.D. Franklyn, "Sweet Land of Liberty," in Anti-Democratic Attitudes in American Schools, ed. H.H. Remmers (Evanston: Northwestern University Press, 1963); Alton Barbour, "Survey Research in Free Speech Attitudes," Free Speech Yearbook (New York: Speech Communication Association, 1971), pp. 28-35; and Alton Barbour "Some Psychological Dimensions of Free Speech Attitudes," Free Speech Yearbook (Falls Church, Virginia: Speech Communication Association, 1978), pp. 68-72; James A. Davis, "Conservative Weather in a Liberating Climate: Change in Selected NORC General Social Survey Items, 1972-1978," Social Forces, 58 (1980), 1154. Davis, of the National Opinion Research Center and Harvard concludes: "During the relatively brief period 1972-1978, the General Social Survey managed to show not only striking change (in selected items), but a lopsided combination of two change models operating simultaneously. There is a definite evidence for a long-term climate trend toward liberalism, predicted by Samuel Stouffer in 1954; but these changes are overshadowed by a conservative shift in

the weather that appears to have hit bellweather groups such as the young and better-educated and backwater categories such as the old and poorly educated about at the same time and with the same impact."

[19]Samuel A. Stouffer, Communism, Conformity, and Civil Liberties: A Cross-Section of the Nation Speaks Its Mind (New York: Doubleday, 1963). This study touches on only one aspect of free speech, and though it is much used by sociologists, it does not provide data to look at changes of attitude over time. The Gallup International Research Institute in its world survey of life satisfaction that in 1976 replicated the Cantril study of the early 1960s, did not ask even one question pertaining to freedom of speech. See George H. Gallup, "Human Needs and Satisfactions: A Global Survey," Public Opinion Quarterly, 40 (1976), 459-467. Also see Emory S. Borgadus "Stereotypes Versus Sociotypes," Sociology and Social Research, 34 (1950), 286-91 and "Comparing Racial Distance in Ethiopia, South Africa and the United States," Sociology and Social Research, 52 (1968), 149-56; George S. Counts, "The Social Status of Occupations: A Problem in Vocational Guidance," School Review, 33 (1925), 6-27. Robert W. Hodge, Paul M. Siegel and Peter H. Rossi, "Occupational Prestige in the United States," American Journal of Sociology, 70 (1964), 280-302.

[20]Robert S. Lynd and Helen Merrell Lynd, Middletown: A Study of American Culture (New York: Harcourt, Brace, Jovanovich, 1929).

[21]Theodore Caplow and Howard M. Bahr, "Half a Century of Change in Adolescent Attitudes: Replication of a Middletown Survey by the Lynds," Public Opinion Quarterly, 43 (1979), 1-17.

[22]Roderick P. Hart, Robert E. Carlson, and William F. Eadie, "Attitudes Toward Communication and The Assessment of Rhetorical Sensitivity," Communication Monographs, 47 (1980), 1-22.

[23]Hart, Carlson, and Eadie, p. 2.

[24]Roderick P. Hart and Don M. Burks, "Rhetorical Sensitivity and Social Interaction," Speech Monographs, 39 (1972), 75.

[25]Donald Darnell and Wayne Brockriede, Persons Communicating (Englewood Cliffs, N.J.: Prentice Hall, 1976), p. 176.

[26]Hart, Carlson, and Eadie, p. 3.

[27]Hart, Carlson, and Eadie, p. 13.

[28]Ibid.

[29]Gallup Opinion Index, Vol. 43-35, p. 40. College students were polled (25) as to their conservatism and liberalism:

	Extremely Conservative	Fairly Conservative	Middle	Fairly Liberal	Extremely Liberal
Demonstrators	2%	10%	12%	48%	3%
Non Demonstrators	2%	19%	29%	41%	2%

[30]William Goding, "The Power and Hostility Dimensions of Free Speech Attitudes," doctoral dissertation, University of Denver, 1969.

[31]Patricia Collett, "Value Dimensions of Free Speech Attitudes," doctoral dissertation, University of Denver, 1969.

[32]Emory Johnson, "An Empirical Study of Relevant Personality Characteristics and Attitudinal Dimensions as Predictors of Free Speech Attitudes," doctoral dissertation, University of Denver, 1972.

[33]James Means, "An Empirical Study of the Relationship Between Anxiety-Proneness and Free Speech Attitudes," doctoral dissertation, University of Denver, 1971.

[34]"A Freedom of Speech Survey."

[35]Hart, Carlson, and Eadie.

[36]"Attitudes Toward Communication."

[37]"Attitudes Toward Communication."

[38]"Attitudes Toward Communication."

[39]"A Freedom of Speech Survey."

[40]"A Freedom of Speech Survey."

[41]Thomas M. Steinfatt, "The Alpha Percentage and Experimentwise Error Rates in Communication Research," Human Communication Research, 5 (1979), 366-374.

[42]Lee J. Cronbach, "Coefficient Alpha and the Internal Structure of Tests," Psychometrika, 16 (1951), 297-334.

[43]Lee J. Cronback and Paul E. Meehl, "Construct Validity in Psychological Tests," Psychological Bulletin, 52 (1955), 281-320; Jim C. Nunnally, Psychometric Theory, 2nd ed. (New York: McGraw-Hill, 1978), pp. 94-109; Lee J. Cronbach, "Test Validation," in R.L. Thorndike, ed., Educational Measurement, 2nd ed. Washington, D.C.: American Council on Education, 1971), pp. 443-507.

[44]Hart, Carlson, and Eadie.